Supreme Court of the United States

OCTOBER TERM, 19

No. 347

JOHN MARTIN BIGELOW, AS RECEIVER OF ESTATE OF THE MORROCO HOLDING COMPANY, INC., PETITIONER,

vs.

EDWARD MARCOLINE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

FILED ON

(33,000)



(33,656)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No. 347

JOHN MARTIN RIEHLE, AS RECEIVER IN EQUITY OF THE MOROSCO HOLDING COMPANY, INC., PETITIONER,

vs.

EDWARD MARGOLIES

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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[fol. 1] **IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK**

ROBERT L. HATCH, Plaintiff,

against

MOROSCO HOLDING COMPANY, INC., Defendant

BILL OF COMPLAINT—Filed July 23, 1923

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

The plaintiff herein by this bill of complaint, on his own behalf and on behalf of all other creditors of the defendant who may elect to come in and contribute to the expense of these proceedings, or who may hereafter join in the prosecution of this suit, shows and submits to the Court as follows:

First. That plaintiff is a citizen of the State of New York and resides in the Borough of Manhattan, in the City of New York, in New York County, within the State of New York.

[fol. 2] Second. That the defendant was incorporated under the laws of the State of Delaware, one of the States of the United States of America, and exists by virtue of the Statutes of said State, and is a citizen and resident of said State. The said defendant has a place of business in the State of New York, in the Borough of Manhattan, in the Southern District of New York, at No. 217 West 45th Street.

Third. The ground upon which jurisdiction of the Court depends is the diversity of citizenship and the amount involved is in excess of Five Thousand ($5,000) Dollars. That this suit in equity is brought for the purpose of enforcing claims against the Morosco Holding Co., Inc., for the appointment of a Receiver or Receivers; determination of claims of creditors of the company; the marshalling of assets and the sale and distribution of the company's assets.

Fourth. That the defendant corporation is indebted to the plaintiff in the sum of Six Thousand ($6,000) Dollars, which said sum is due the plaintiff by reason of the following facts and circumstances: That heretofore and on or about the 1st day of February, 1923, the defendant corporation did, for full value received, issue its certain negotiable paper, to wit—a check in the sum of Six Thousand ($6,000) Dollars, drawn upon the Gotham National Bank, in the Borough of Manhattan, City of New York, to the order of one August Janssen. That said check was thereafter and on or about the 3rd day of February, 1923, for full value received, duly endorsed by said August Janssen and delivered to the said plaintiff and the said plaintiff is now [fol. 3] the owner and holder of the said instrument. That from time to time, plaintiff has presented said check for payment at the bank upon which it was drawn, to wit, the Gotham National Bank, and payment thereof has been refused, and that upon information and belief, said defendant corporation has never, at any time since the issuance of said check, had on deposit in the Gotham National Bank funds sufficient to cover the same. That the said August Janssen is a citizen of the State of New York and resides in the Borough of Manhattan, City of New York, County of New York, in the Southern District of New York. Said sum of Six Thousand ($6,000) Dollars is wholly unpaid and there are no offsets or counterclaims thereto.

Fifth. That upon information and belief, the defendant company was organized under the laws of the State of Delaware on or about the 20th day of March, 1921, and has outstanding One Hundred Seventy-five Thousand (175,000) shares of its capital stock, Fifteen Thousand (15,000) shares of which consist of preferred stock, of the par value of One Hundred ($100) Dollars per share, and One Hundred Sixty Thousand (160,000) shares of said capital stock are common shares, without nominal or par value.

Sixth. That upon information and belief, the defendant company is also the owner of stock of other corporations, to wit—the owner of the capital stock of the Morosco Theatre Co., Inc., a New York corporation. That upon information and belief, the amount of capital stock of the Morosco Theatre Co., Inc., which the said defendant com-

pany is the owner of, is One Hundred (100) shares of the par value of One Hundred ($100) Dollars and that upon in-
[fol. 4] formation and belief said amount is, for all practical purposes, the entire issued capital stock of said Morosco Theatre Co., Inc.; and is the owner of the entire capital stock of the Morosco Productions Co., Inc., a California corporation.

Seventh. That the defendant company owns valuable real property and leaseholds of real property in the State of California and in the State of New York and it leases real property. That said defendant company is also the owner of certain memberships in certain theatrical producing organizations and associations; that it is the owner of numerous copyrights for dramatic plays and for motion picture productions; that it is the owner of large amounts of "properties" used in theatrical productions of various types; that it is the owner of large amounts of fixtures, furniture, equipment, theatrical equipment, royalty contracts; that said defendant company is also the owner of a large amount of notes receivable and accounts receivable; that said defendant also owns valuable contracts and among which is a valuable contract with the Associated First National Pictures, Inc., a motion picture distributor.

Eighth. That the defendant company is engaged in the business of theatrical production and motion picture production and has been engaged in the leasing out of certain of its leaseholds to other persons, concerns and corporations at a profit.

Ninth. That heretofore and pursuant to certain arrangements made between this Company and one Oliver Morosco, the defendant company did take over certain obligations of
[fol. 5] the said Oliver Morosco to one Annie T. Morosco, upon information and belief, the former wife of said Oliver Morosco. That upon information and belief, said obligations so taken over, remain a lien upon the assets of the defendant company, and upon information and belief, the amount of said lien at said time is in excess of Thirty Thousand ($30,000) Dollars. That upon information and belief, the time for payment of said lien of Annie T. Morosco has matured and the said obligations have matured and are now due and owing to said Annie T. Morosco and

the said Annie T. Morosco is in a position to foreclose the said lien upon the assets of the said defendant company. That there is now due to certain banks on the notes of the defendant company, or will, within the next thirty days become due to said institutions, sums of money in excess of Two Hundred Thousand ($200,000) Dollars, and that upon information and belief, the defendant company has no immediate means of meeting the said obligations. That many of the company's notes all outstanding have become due at the present time and that the company is subject to being sued on said notes and the said banks are pressing the defendant for immediate payment. That in such an event, judgment would follow suit, and execution would result in a great loss, and upon information and belief, an unnecessary loss to the defendant company and its creditors and stockholders. That there are also outstanding accounts payable for current expenses in a sum approximating Thirty-five Thousand ($35,000) Dollars and that such outstanding current accounts should be paid in order to preserve the valuable assets of the defendant corporation, but that as conditions exist with reference to the cor- [fol. 6] poration today, it will be inadvisable on the part of any person to endeavor to aid in the financing of said corporation, owing to the fact that the corporation is likely to be harassed, as is more fully mentioned hereinafter. That there are payments necessary to be made in the near future, in order to preserve the valuable leaseholds of the defendant, and that the defendant has no immediate means at hand to make such payments. Upon information and belief, there has been proposed by one of the officers of the company the outright sale at a sacrificial price of a valuable leasehold of theatre property in Los Angeles belonging to the defendant, and that the consummation of any such project of sale would greatly decrease the material assets of the company and injure its prestige. That upon information and belief, there is due and owing to one Oliver Morosco, the former president and director of the defendant corporation, the sum of approximately Twenty-six Thousand ($26,000) Dollars, which said sum is payable weekly in installments of Five Hundred ($500) Dollars, and as evidence of which indebtedness against the defendant corporation, the said Oliver Morosco holds fifty-two (52) prom-

issory notes of the company in the sum of Five Hundred ($500) Dollars each. That upon information and belief, said holder of said notes can, in the event of the failure of payment of any one thereof, proceed against the defendant corporation, and that upon information and belief, in all likelihood a default in the payment of any one of said notes would be met by vigorous legal proceedings. That by reason of the critical situation which the defendant company finds itself in, it is, upon information and belief, impossible for it to operate its assets in such a manner as to properly meet its obligations, for the reason that no credit [fol. 7] can be obtained for the said defendant company, nor can any person or persons be approached with any hopes of success of financial assistance while the company is such as is outlined above. That the granting of relief asked for in this petition would tend to stabilize financial exigencies of the defendant corporation and tend to maintain the status quo of its affairs, which results might enable it to properly and in the most economical manner bring about an equitable distribution of its assets without the attendance of frightful loss in the undertaking. That upon information and belief, there are at the present moment four main sources of danger to the defendant company. These four sources are as follows: The bank creditors of the company; Annie T. Moroseo; the largest creditor of the company is one August Janssen, its president, whom the company is indebted to in a sum exceeding One Hundred Forty Thousand ($140,000) Dollars for cash contributions, and he is also the guarantor on the company's notes at the bank to the sum of approximately Two Hundred Twenty-five Thousand ($225,000) Dollars; and the current creditors whose accounts aggregate approximately Thirty-five Thousand ($35,000) Dollars. That these four groups are not exclusive, but that the waging of any conflict between them on the open field of battle would be, as has been above intimated, disastrous. That the only means whereby the defendant can meet its obligations is by the continued maintenance and operation of its assets, to wit—its theatre properties, its motion picture productions and its general business as a theatrical and motion picture producer.

Tenth. Unless this court of equity takes the property and assets of the defendant into judicial custody, the re- [fol. 8] sult would be a multiplicity of suits and a race of diligence. Any attempt on the part of the plaintiff to enforce his claims as a general creditor would precipitate similar action on the part of other creditors and would in turn lead to wasteful strife and controversy which plaintiff believes can be avoided; and the property of the company preserved for equitable distribution only by the intervention of a court of equity and the granting of equitable relief, including the appointment of a receiver. That the aforesaid condition of affairs, which would follow in the absence of the intervention of equity, would result in the spoliation of valuable assets at the hands of individual creditors whose haste, as the Court can well appreciate, would render practically valueless many of the valuable assets of the company, such as its leasehold of theatrical properties, its copyrights and its membership rights as a theatrical producer. That upon information and belief, the defendant company is the owner, subject to liens not in excess of Thirty Thousand ($30,000) Dollars, of two leaseholds, one in New York City, at No. 217 West 45th Street, and one in the City of Los Angeles, in the State of California. That upon information and belief, each of these said leaseholds is worth Sixty Thousand ($60,000) Dollars a year, and at the present computed value are easily worth the sum of Three Hundred Thousand ($300,000) Dollars. That either of said leaseholds might be sacrificed for practically nothing at the diligent prosecution of some individual creditor. That the stock financing of the said company, upon information and belief, is not as yet complete in that there are many outstanding notes of stock subscribers who purchased the stock of the company on a partial payment plan who have not completed their payment [fol. 9] for stock, and the said accounts receivable may still be saved to the company under proper leadership and guidance of this Court, whereas in the event of a race of diligence on the part of various individual creditors, the situation will be one of such confusion to terrify any such debtor of the company. Upon information and belief, said company is solvent and could meet its obligations if proper protection be afforded to it during such period of time

as may be necessary to calmly and thoroughly liquidate its assets or operate itself into a position where the present critical situation has been overcome. Otherwise great and severe loss will be inflicted on all the creditors and stockholders of the defendant.

Eleventh. In consideration whereof and inasmuch as plaintiff has no adequate remedy at law and can have relief only in equity, the plaintiff files this bill of complaint on behalf of himself and all of the other creditors of the defendant who may come in and contribute to the expense hereof, and prays for equitable relief as follows:

1. That the rights of the plaintiff and of all other creditors of the defendant may be ascertained and decreed; that the Court will fully administer the funds in which the plaintiff is interested, constituting the entire property and assets of the defendant company.

2. That for the purpose of preserving intact the property and assets of the defendant, a receiver or receivers may be appointed of the defendant and of all its properties and assets, real and personal, of whatsoever nature and description, and wheresoever situate, with full power to sue for, [fol. 10] collect, receive and take into his possession the goods, chattels, rights, credits, monies, effects, lands, tenements, books, papers, properties and assets of every description of the defendant, and with all the incidental powers ordinarily vested in receivers in like cases, with full power to operate the assets and to collect and receive all rents and profits and to protect and preserve the property rights, the franchises, the memberships, and to do all and everything necessary to the preservation of the company's assets, and to continue the business of the company, pursuant to the powers conferred upon the company by its State Charter, if in the opinion of the receiver or receivers, the company's assets can be enhanced, protected or preserved by the continuance of its business and the operation of its assets.

3. That at such time as may be found proper, the property of the defendant may be ordered to be sold in whole or in part and any order of sale may make proper and suitable provisions for the preservation of all equities,

rights, priorities and liens of creditors and the proper distribution of the proceeds of sale. That such properties may be sold subject to or free and clear of all liens and encumbrances. Or that in the event that the Court shall so adjudicate, the said property of the defendant may be returned to it; and that plaintiff may have such other and further relief as shall to the Court seem proper and as may be necessary to fully protect and enforce the rights and equities of the plaintiff and of all the creditors and stockholders of the defendant.

4. That temporarily and pending the suit, an injunction may issue against the defendant and all persons claiming or acting under it, to restrain them from interfering with [fol. 11] said receiver or receivers taking possession of such property and assets, and that the plaintiff have such other and further relief in the premises as the nature of the case may require and may be agreeable to equity.

5. That the defendant be required to answer all and singular the matters above stated, but not under oath, answer under oath being hereby expressly waived.

6. That a writ of subpœna may be granted to plaintiff to be directed to the defendant thereby requiring the said defendant personally to appear on a certain day before the Court and then and there full, true and direct and perfect answers to make to all and singular the premises, but not under oath, answer under oath being hereby expressly waived, and further to perform and abide by such further order, direction or decrees therefor as to the Court shall seem meet.

F. Wright Moxley, Solicitor for Plaintiff, 68 William Street, New York City.

[File endorsement omitted.]

[fol. 12] *Duly sworn to by Robert L. Hatch. Jurat omitted in printing.*

[fol. 13] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER

The Morosco Holding Co., Inc., hereby files its answer to the bill of complaint herein or unto so much thereof and such parts thereof as such defendant is advised it is necessary or material for such defendant to make answer to and answering says:

First. The defendant admits all the allegations of said bill of complaint.

Second. The defendant reiterating the admissions of the preceding article "First" of this answer, joins in the prayer of such bill of complaint and prays that the Court may take possession of the assets of the company through the appointment of a receiver and hereby protect and preserve the assets of the company and the said receiver may be empowered to collect outstanding obligations due the company and that the Court may direct that a proper order may be entered of sale and distribution of the assets of the company which will recognize the equities, priorities and liens [fol. 14] against the assets of the company of every nature and description, and that an injunction shall issue which will by its terms protect the receiver from interference in his possession of said assets by the defendant or by any of its representatives and that the Court confer upon the said receiver such power as in the Court's opinion may be necessary to effectually bring about complete preservation of the assets of the company to the end that full equity may be done in every instance to every person who is entitled to equitable relief under all the circumstances and in all the premises.

Third. That the defendant becomes obedient to this court of equity and prays for its instruction and direction.

Hyman Bushel, Solicitor for Defendant, Morosco Holding Co., Inc. Office & P. O. address: No. 1482 Broadway, Borough of Manhattan, city of New York.

[fol. 15] *Duly sworn to by August Janssen. Jurat omitted in printing.*

[fol. 16] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF MOTION FOR ORDER CONFIRMING REPORT OF SPECIAL MASTER

SIRS:Please take notice, that upon the report of Special Master Bern Budd, Esq., dated September 23, 1927, filed in the office of the United States District Court for the Southern District of New York, on the 26th day of September, 1927, and upon the minutes had in the proceedings before the Special Master on the hearing of the claim of Edward Margolies against Morosco Holding Company, Inc., held in the office of the Special Master at 111 Broadway, in the Borough of Manhattan, City of New York, on the 20th day of September, 1927, and upon all the proceedings heretofore had herein by virtue of which the said hearing on the claim of Edward Margolies against Morosco Holding Company, Inc., was referred to the said Special Master for hearing and determination, the undersigned will move this court at a Special Term for motions to be held at Room 235 of the General Post Office Building in the Borough of Manhattan, City of New York, on the 4th day of October, 1927, at 10 o'clock in the forenoon of that [fol. 17] day, or as soon thereafter as counsel can be heard, for an order confirming the report of the Special Master herein, and for a decree allowing the claim of Edward Margolies herein, in the sum of Fifty-five thousand one hundred one Dollars and Forty-one Cents ($55,101.41), and for such other and further relief as to this court may seem just and proper.

Dated New York, September 30, 1927.

Yours, etc., Nathan Burkan, Attorney for Claimant, Edward Margolies, 1451 Broadway, Borough of Manhattan, City of New York.

To F. Wright Moxley, Esq., Attorney for the Receiver herein, 68 William Street, Borough of Manhattan, City of New York.

[fol. 18] IN UNITED STATES DISTRICT COURT

[Title omitted]

MINUTES OF HEARING BEFORE SPECIAL MASTER

Before Bern Budd, Esq., Special Master, 111 Broadway, New York City, September 20th, 1927, at 2.30 P. M.

Appearances:

F. Wright Moxley, Esq., attorney for John Martin Riehle, Esq., Receiver.

Nathan Burkan, Esq., attorney for claimant.

The Master: Go ahead, Mr. Burkan.

Mr. Burkan: Now, Mr. Budd, I offer in evidence order of Judge Winslow, made in this proceeding on the 12th day of July, 1927.

The Master: Is that the original?

Mr. Burkan: The original is on file.

The Master: You file with me a copy of it?

Mr. Burkan: A copy, yes.

[fol. 19] The Master: I have a copy here.

Mr. Burkan: And I also offer in evidence the notice of hearing, with admission of service of Mr. Moxley.

The Master: It is filed.

Mr. Burkan: And I offer in evidence an exemplified copy of the judgment roll in the suit of Edward Margolies against the Morosco Holding Company, Inc., rendered in the Supreme Court, Kings County, on the 16th day of May, 1925.

Mr. Moxley: The Receiver objects to it upon the ground that that has no materiality to this proceeding, and, off the record——

The Master: Let us have it all on the record.

Mr. Moxley: Well, that is all.

The Master: The exemplified copy is received in evidence, in accordance with the direction contained in the order referring this matter to me, dated July 12th, 1927. An exception to the Receiver. Mark it.

(Marked Claimant's Exhibit 1, September 20th, 1927.)

Mr. Burkan: You will note, Mr. Budd, that the principal amount of this judgment is $49,407.88, and the costs awarded under that judgment were $138.35. I am excluding the interest awarded by that. Instead, I have computed the interest from the 14th day of December, 1925, in pursuance of the order of Judge Winslow.

The Master: After deducting from the judgment the amount of interest included in the judgment, what figure have you?

Mr. Burkan: $49,596.23.

The Master: And have you computed, in lieu of the interest deducted, interest from December 14th, 1925?

Mr. Burkan: I have, sir.

[fol. 20] The Master: And what is that figure?

Mr. Burkan: And that figure is $5,505.18. Making a total of $55,101.41. And the claimant rests.

Mr. Moxley: It would be the aim of the Receiver here to save the receivership estate some expense, if possible, and I thought if possibly Mr. Burkan would allow me to offer, without the presence of these witnesses, the testimony of the four witnesses, Benjamin A. Lang, Edward Lang, Edmond V. Geroux and Edward Margolies.

The Master: For what purpose?

Mr. Moxley: For the purpose of going into this claim de novo.

Mr. Burkan: I object to it as entirely incompetent, immaterial and irrelevant.

The Master: What is your view as to the conclusiveness of this judgment roll?

Mr. Burkan: Absolutely final, and so held by the Circuit Court of Appeals.

The Master: And as I read the order of reference, I must accept that as conclusive proof; and therefore I must reject, I think, any testimony of any nature whatsoever from the Receiver.

Mr. Moxley: Well, all I would like is that Mr. Burkan would waive the necessity of these witnesses being present. If not, I will ask for a week's adjournment, and I will have to have them all here. That will cost me considerable money to bring them here and put them on the stand, that is the point.

The Master: I think we can get a record here, without the presence of the witnesses.

Mr. Moxley: I think so.

Mr. Burkan: Except this, Mr. Budd: So far as I am concerned, I absolutely object——

The Master: Why don't you make an offer of proof, so that he will have his record?

[fol. 21] Mr. Burkan: I should like to object, upon the record, for my protection. I object to any offer of proof, or any tender of proof, upon the ground that this judgment is absolutely conclusive, and so has been held by the Circuit Court of Appeals.

The Master: I understand that. Let him make it first, then you can object to it. Make your offer of proof.

Mr. Moxley: I offer to prove by the witnesses Benjamin A. Lang, Edward J. Lang, Edmond V. Geroux and Edward Margolies that the damages and claims of Edward Margolies against the Morosco Holding Company will not exceed $12,000.

The Master: Now, your objection to that, Mr. Burkan?

Mr. Burkan: I object to it upon the ground it is incompetent, immaterial and irrelevant, not binding upon the claimant; and the claimant will not consent to any such waiver, nor to the acception of any such evidence.

The Master: The objection is sustained upon the ground that the order referring this matter to me directs me to accept as conclusive proof of the claim the judgment roll which has been offered in evidence.

Mr. Moxley: Of course, I want to be frank and say I have not here Benjamin E. Lang or Edward J. Lang, and if any objection is taken to the fact that I have not them here, I would like a week's adjournment, within which time I will have to pay their carfare to get them here and put them on the stand. That is the only way.

The Master: My ruling would be the same if they were here.

Mr. Moxley: Well, will you waive the necessity of my bringing them here, Mr. Burkan? To show the Receiver's good faith, I have an affidavit——

[fol. 22] The Master: I do not think he needs to waive it. You have offered to prove it and he has objected to it and I have sustained it.

Mr. Moxley: You have refused to allow me to put anybody on?

The Master: Yes. I think that under the order of reference I must refuse any proof of any nature whatsoever, except possibly as to the correctness of the exemplification.

Mr. Moxley: Well, of course, I have not anything in that line. So that as I understand the Special Master's ruling, you refuse to allow me to call any witness to the stand to show that this claimant's claim is less than the amount of this judgment?

The Master: I so rule, with an exception to you.

Hearing closed.

[fol. 23] In United States District Court

[Title omitted]

Special Master's Report

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

I, Bern Budd, to whom it was referred, as Special Master, by order of this Court dated July 12th, 1927, to hear the claim of the above-named claimant, and to report thereon to this Court, do respectfully report as follows:

Upon the hearing before me, I was attended by F. Wright Moxley, Esq., for the Receiver, in opposition to the claim of the claimant, and by Nathan Burkan, Esq., in support of the claim.

On July 1st, 1923, John M. Riehle was appointed Receiver of the property, assets and effects of the defendant. The Receiver objected to the claim made by Edward Margolies and rejected the claim, which was thereupon referred to me to hear and report.

The claim was first brought on for hearing by notice served by the Receiver's attorney, returnable before me [fol. 24] November 11th, 1923. The claimant then defaulted, his attorney informing me that he at that time had filed no claim and would not appear. Upon the Receiver's motion, the claim was then dismissed.

Thereafter there was filed with me a verified proof of the claimant's claim, dated May 26th, 1925, for hearing on which I gave notice returnable before me on June 26th, 1925. The Receiver and the claimant appeared by their counsel. The Receiver's counsel contested the right of the Master to hear the claim upon the ground that the period limited by the order of this Court for the filing of claims with the Receiver had expired prior to the receipt of the instant claim. The claim was again dismissed entirely upon this ground.

Thereafter, and on November 27th, 1925, this Court made an order permitting the filing of the claim with the Receiver on or before December 7th, 1925. Before that date the claim was filed, and it came on to be heard before me upon the merits on December 14th, 1925.

The claimant then offered in evidence the judgment roll and an exemplified copy thereof in an action in the Supreme Court of the State of New York, Queens County, wherein he, the claimant, Edward Margolies, was the plaintiff, and the Morosco Holding Company, Inc., was the defendant, which judgment was entered May 16th, 1925. The judgment so entered was in favor of the plaintiff, the claimant herein, and against the defendant, for the sum of $55,283.88, interest upon which, to the date of the hearing, amounts to $1,934.93. The correctness of the exemplification was conceded. Counsel for the claimant stated that the judgment roll and the exemplification of the judgment roll were offered for the purpose of proving the claimant's claim. Its receipt in evidence was objected to upon [fol. 25] the ground that the Circuit Court of Appeals for the Second Circuit had held that the judgment was not binding upon the Receiver.

Upon the authority of the opinion of the Circuit Court of Appeals for the Second Circuit in this suit, directing a vacation of the stay of the action in the State Court, but stating that any judgment in the State Court should not be taken to be a liquidation of the claim of this claimant (5 Fed. 2nd, 1015), I sustained the Receiver's objection to the receipt of the exemplification of the judgment roll in evidence, and recommended the dismissal of the claim.

From the order confirming my report and dismissing the claim, the claimant appealed to the Circuit Court of Ap-

peals, which Court reversed the District Court and remanded the case for further proceedings consistent with the opinion (, Fed. 2nd,).

Pursuant thereto, the District Court made the order of July 12th, 1927, again referring the claim to me as Special Master, which order, inter alia, contains the following provision:

"Ordered, adjudged and decreed that upon the hearing on said claim * * * the claimant may offer in evidence an exemplified copy of the judgment rendered in the Supreme Court of the State of New York, Queens County, in favor of the claimant, Edward Margolies, and against the defendant, Morosco Holding Co., Inc., in the sum of $55,283.88, filed and entered in the office of the Clerk of the County of Queens on May 16th, 1925, and that such exemplified copy of said judgment shall be received as conclusive proof of the claimant's claim against said Receiver, [fol. 26] and said Special Master is hereby directed to accept such proof, except that he deduct from the amount of said judgment the amount of interest included therein and allow in lieu thereof interest from the 14th day of December, 1925 * * *."

The exemplified copy of the judgment was offered in evidence and received, over the Receiver's objection. The Receiver offered to make proof that the indebtedness of the defendant to the claimant was less than the amount of the judgment. This proof was objected to and was rejected upon the ground that its receipt in evidence was precluded under the order of July 12th.

After the deduction of the interest included in the judgment, the amount of the judgment is $49,596.23. Interest from December 14th, 1925, amounts to $5,505.18.

I therefore recommend that an order be made allowing the claim in the sum of $55,101.41.

I file herewith a transcript of the testimony taken before me.

Bern Budd, Special Master.

Dated September 23rd, 1927.

[fol. 27] IN UNITED STATES DISTRICT COURT

[Title omitted]

EXCEPTIONS TO REPORT OF SPECIAL MASTER

The receiver herein, John Martin Riehle, excepts to the report of Bern Budd, Special Master, dated the 23rd day of September, 1927, and on or about said day entered in the office of the Honorable Clerk of this Court, in the following particulars:

I. To the finding of fact that the claimant, Edward Margolies, in these proceedings has a valid claim against the Morosco Holding Company, Inc., and against the Receiver therein the sum of $55,101.41.

II. To the failure and refusal of the Special Master to hold that the Receiver, John Martin Riehle herein, had a right to submit in opposition to the claim of Edward Margolies proof that the indebtedness of the defendant, Morosco Holding Company, Inc., to the claimant, Edward Margolies, was less than the sum of $55,101.41.

III. To the failure and refusal of the Special Master to [fol. 28] permit the Receiver, John Martin Riehle, to offer evidence to show that the amount of any money due from the Morosco Holding Company, Inc., to the said claimant, Edward Margolies, was less than the amount of the judgment obtained by Edward Margolies against the Morosco Holding Company, Inc., in the Supreme Court of the State of New York, County of Queens, upon which said judgment the said Edward Margolies bases his said claim.

IV. To the conclusions of law found by the Special Master from which it appears that the Special Master admitted the claim on the authority of the opinion of the Circuit Court of Appeals and of a certain order of the United States District Court for the Southern District of New York.

F. Wright Moxley, Attorney for John Martin Riehle, Receiver of Morosco Holding Company, Inc. Office & P. O. address: 1560 Broadway, Borough of Manhattan, City of New York.

Dated New York, October 3rd, 1927.

[fol. 29] IN UNITED STATES DISTRICT COURT

[Title omitted]

MINUTES OF HEARING BEFORE WINSLOW, D. J.

Before Hon. Francis A. Winslow, D. J., New York, October 20, 1927, at 4 P. M.

Hearing on Motion to Confirm Report of Special Master in the Claim of Edward Margolies

Appearances:

F. Wright Moxley, Esq., attorney for John Martin Richle, Esq., Receiver.

Nathan Burkan, Esq., attorney for the claimant.

The Court: Is there anything you want to put on the record?

Mr. Moxley: I would like to have the appearances noted. [fol. 30] Mr. Burkan appearing for the claimant, Edward Margolies, and Mr. Moxley appearing for the Receiver. Mr. Moxley moves——

The Court (interposing): Wait a minute. This is a motion to confirm the report of the Special Master in the claim of Edward Margolies; the report of the Special Master bearing date September 23rd, 1927, on file in this Court.

Mr. Moxley: I make the counter motion that the report be rejected on the ground that the decision of the Circuit Court of Appeals herein, and affecting this very claim, if properly construed, would entitle the Receiver to interpose evidence, which evidence would show that the claim of Mr. Margolies, if any he has, was in a sum very much less than the amount of this judgment of fifty-three odd thousand dollars.

(After colloquy off the record:)

The Court: The report will be confirmed.

Mr. Moxley: Of course, the Receiver will take an exception. Then may I file this memorandum, so it will be in the papers (filing paper)?

Hearing closed.

[fol. 31] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER OF REFERENCE TO SPECIAL MASTER—July 12, 1927

This court having on the 15th day of March, 1926, made an order confirming the report of the Special Master herein, Bern Budd, Esq., dated January 11, 1926, and filed with the Clerk of this court on January 22, 1926, disallowing and dismissing the claim of Edward Margolies against this defendant, and the said claimant, Edward Margolies, having appealed from said order to the United States Circuit Court of Appeals for the Second Circuit, and said appeal having duly come on to be heard and said court having rendered its decision, reversing the said order of this court of March 15, 1926, with costs to said Edward Margolies in the sum of $231.70, and remanding the cause to this court with instructions to proceed in accordance with the decision of said [fol. 32] Circuit Court of Appeals as filed, and having filed its mandate on June 22, 1927, with the Clerk of this court,

It is, on motion of Nathan Burkan, Esq., attorney for claimant, Edward Margolies,

Ordered, adjudged and decreed that said order of this court of March 15th, 1926, be and the same is hereby vacated and set aside; and it is further

Ordered, adjudged and decreed that the claimant, Edward Margolies be, and he hereby is permitted to prove his claim in the sum of $55,283.88 against John Martin Riehle, Esq., the Receiver of this defendant, before Bern Budd, Esq., the Special Master herein, and that said Special Master take proof and testimony with respect to such claim on three days' written notice to be given by said claimant to said Receiver; and it is further

Ordered, adjudged and decreed that upon the hearing on said claim before said Special Master, the claimant may offer in evidence an exemplified copy of the judgment rendered in the Supreme Court of the State of New York, Queens County, in favor of the claimant, Edward Margolies, and against the defendant, Morosco Holding Co., Inc., in the sum of $55,283.88, filed and entered in the office of the Clerk of the County of Queens on May 16, 1925, and that

such exemplified copy of said judgment shall be received as conclusive proof of the claimant's claim against said Receiver; and said Special Master is hereby directed to accept such proof, except that he deduct from the amount of said judgment the amount of interest included therein, and allow in lieu thereof interest from the 14th day of December, 1925, when said exemplified copy of said judgment was first offered in evidence before the Special Master; and it is further

[fol. 33] Ordered, adjudged and decreed that John Martin Riehle, Esq., the Receiver of the defendant, Morosco Holding Company, forthwith pay to the said Edward Margolies the sum of $231.70, the costs allowed by the United States Circuit Court of Appeals for the Second Circuit.

Francis A. Winslow, Judge.

In United States District Court

[Title omitted]

Order Confirming Report of Special Master—Oct. 20, 1927

Edward Margolies, claimant herein having moved this [fol. 34] court for an order confirming the report of Bern Budd, Esq., the Special Master herein, and for a decree allowing the claim of said Edward Margolies, in the sum of $55,101.41,

Now, upon reading and filing the report of Bern Budd, Esq., the Special Master herein, dated September 23rd, 1927, and filed with the clerk of this court on the 26th of September, 1927, and upon the minutes taken in the proceedings had before the Special Master on the hearing of the claim of said Edward Margolies against the Morosco Holding Company, Inc., held in the office of the Special Master, and the exemplified copy of the judgment roll offered before said Special Master and marked "Claimant's Exhibit I," and the order of Hon. Francis A. Winslow, dated the 12th day of July, 1927, which referred the claim of Edward Margolies to said Special Master, and upon the notice of hearing before the Special Master, with proof of service thereof, and the notice of motion herein,

dated September 30th, 1927, to confirm the Special Master's report, and after hearing Nathan Burkan, Esq., in support of said motion, and F. Wright Moxley, Esq., in opposition thereto, and due deliberation having been had,

It is, on motion of Nathan Burkan, attorney for said claimant, Edward Margolies,

Ordered that said motion be and the same is hereby granted, and the said report of the Special Master, Bern Budd, Esq., is hereby in all respects confirmed; and it is further

Ordered that the claim of Edward Margolies against this defendant, the Morosco Holding Company, Inc., be and the same is hereby allowed in the sum of Fifty-five thousand one hundred and one Dollars and Forty-one Cents ($55,101.41).

Francis A. Winslow, United States District Judge.

In United States District Court

[fol. 35] Exemplified Judgment Roll—Claimant's Exhibit 1 for Identification

The People of the State of New York, by the Grace of God Free and Independent, to all to whom these presents may come, Greeting:

Know ye: That we have inspected the files and records in the office of the Clerk of the County of Queens, the Borough of Queens, in said County, do find a certain judgment roll remaining there on file of record in the words and figures following, to wit: Supreme Court, Queens County. Edward Margolies, Plaintiff, against Morosco Holding Co., Inc., Defendant.

[fol. 36] In Supreme Court, Queens County

Edward Mandelbaum, Plaintiff,

against

Monroe Holding Co., Inc., Defendant

Summons

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the plaintiff's attorney, within twenty days after the service of this summons, exclusive of the day of service. In case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Nathan Burkan, Attorney for Plaintiff. Office and Post Office address: 1451 Broadway, New York City, Manhattan Borough.

Dated May 11th, 1923.

[fol. 37] In Supreme Court, Queens County

[Title omitted]

Complaint—Filed May 6, 1925

Plaintiff, complaining of defendant, by Nathan Burkan, his attorney, alleges:

For a First Cause of Action

First. Upon information and belief that at all the times hereinafter mentioned the defendant was and still is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware.

Second. That on or about the 18th day of December, 1922, plaintiff and defendant entered into a contract in writing wherein and whereby the plaintiff agreed to furnish all the

materials and perform all the work in the erection of a theatre and business building to be erected on Spring Street, running back along Exchange Place, in Titusville, Pennsylvania, in accordance with certain drawings and specifications and general conditions, and to complete the [fol. 38] same on or before June 15th, 1923, at a cost to the defendant not to exceed $172,000.00.

A copy of said contract is hereto annexed and marked "Exhibit A."

Third. Said agreement, Exhibit A, further provide that payments to the plaintiff shall be made on or about the tenth day of each month for 85 per cent of the work and materials on the job, and that proper itemized requisitions shall be presented by the plaintiff on or about the 1st day of each month to the architect mentioned in said contract, to wit, one Eugene De Rosa of 110 West 40th Street, New York City.

Fourth. That on or about January 18th, 1923, plaintiff caused the work of construction of said theatre and business building to be begun and caused the foundation of such structure to be excavated and laid and the brickwork on said building to be erected, and caused other work, labor and services to be rendered thereon and materials furnished in connection therewith, so that up to April 5th, 1923, the plaintiff had performed or caused to be performed work, labor and services, and had paid insurance premiums, and had furnished materials in the erection of said building, of the fair and reasonable value of $7,545.46.

Fifth. That plaintiff thereupon presented an itemized requisition to the said architect herein, Eugene De Rosa, on April 5th, 1923, for said amount of $7,545.46, and said requisition was duly approved in writing by said architect, and plaintiff presented such requisition, duly approved, on April 10th, 1923, to the defendant herein and demanded payment of 85 per cent of said sum of $7,545.46, to wit, [fol. 39] $6,413.64, and the defendant failed and refused to pay the same or any part thereof.

Sixth. That plaintiff continued in the performance of said work under the contract, Exhibit A, after April 5th, 1923, and furnished or caused to be furnished work and

labor and services and materials in the construction of the said building, and paid insurance premiums thereon down to May 1, 1923, of the fair and reasonable value of $29,651.54.

Seventh. That thereupon, and on or about the 10th day of May, 1923, plaintiff presented a requisition to the said architect, Eugene De Rosa, for the aforesaid amount of $29,651.54, and that said architect duly approved and certified said requisition in writing and plaintiff thereupon and on or about the 16th day of May, 1923, presented said requisition to the defendant herein and demanded payment of 85 per cent. of said sum of $29,651.54, and the defendant then and there failed and refused to pay said sum or any part thereof.

Eighth. That plaintiff has duly performed the said contract, Exhibit A, and each and every term, condition and covenant thereof on his part required to be performed, except in so far as he was prevented from such performance by the acts of the defendant, and is ready, willing and able to continue to perform said contract.

Ninth. That it was within the contemplation of this contract that payments thereon would be made monthly as required therein, in order that the plaintiff would be enabled [fol. 40] to pay for the work, labor and services rendered and the materials furnished on the job, and that without receiving such payments as and when the same became due plaintiff has been unable to continue to pay for the work, labor and services and materials furnished hereunder, and the acts of the defendant in refusing to make the payments as and when the same became due constitute an essential breach of the said contract, Exhibit A, and constitute a repudiation of said contract, Exhibit A, and by reason of said breach and repudiation on the part of the defendant the plaintiff has been prevented from further performance of the said contract on his part and will continue to be prevented from any further performance on his part.

Tenth. That there is now due and owing to the plaintiff from this defendant the sum of $7,545.46, as per the requisition of April 5, 1923, and the sum of $29,651.54, as per the requisition of May 10, 1923.

As and for a Second Cause of Action

Eleventh. The plaintiff repeats, reiterates and realleges each and every allegation contained in paragraphs "First," "Second," "Third," "Fourth," "Fifth," "Sixth," "Seventh," "Eighth" and "Ninth" of this complaint, with the same force and effect as if the same were fully and at length set out.

Twelfth. That in reliance upon said contract, Exhibit A, plaintiff entered into various contracts with sub-contractors for the furnishing of the materials and the performance of the work on said theatre and business building, and the plaintiff obligated himself to pay said sub-contractors divers substantial sums of money therefor.

[fol. 41] Thirteenth. That by reason of the sub-contracts hereinabove set forth, the plaintiff is obligated to pay the various sub-contractors on contracts made between this plaintiff and such sub-contractors with reference to the work aforesaid the sum of $72,184.00, which sum will be the loss incurred by this plaintiff by reason of the defendant's breach and repudiation of the contract; and in addition thereto plaintiff has been deprived of the sum of $15,000.00 profit that he would have made hereunder.

Wherefore plaintiff demands judgment against the defendant in the sum of $124,381.00, with interest on the sum of $7,545.46 from April 5th, 1923, and with interest on the sum of $29,651.54 from May 16, 1923, and with interest on the balance of the sum for which judgment is demanded from the date hereof, besides the costs and disbursements of this action.

Nathan Burkan, Attorney for the Plaintiff. Office & Post Office address, 1451 Broadway, Borough of Manhattan, New York City.

[File endorsement omitted.]

[fol. 42] *Duly sworn to by Edward Margolies. Jurat omitted in printing.*

[fol. 43] State of New York,
City and County of New York, ss:

Robert Burns, being duly sworn, deposes and says that he is over the age of 21 years. That on the eighteenth day of May, 1923, at No. 217 West 45th Street in the Borough of Manhattan, City of New York, he served the foregoing summons and complaint upon Mr. George R. Bentel, the vice-president of the defendant in this action, by delivering to and leaving personally with said George R. Bentel a true copy thereof.

Deponent further says that he knew the person so served as aforesaid to be the person mentioned and described in the foregoing summons and complaint.

Robert Burns.

Sworn to before me this 18th day of May, 1923. Lillian Irene Fink, Notary Public. New York County No. 353. New York Register No. 5305. Bronx County No. 20, Bronx Reg. No. 234. Term expires March 30, 1925.

[fol. 44] In Supreme Court, Queens County

[Title omitted]

Notice of Trial.

Please to take notice that the issues of law and fact in this action will be brought to trial, and an inquest taken therein, at a Trial Term of the Court appointed to be held in and for the County of New York at the County Court House in Borough of Queens, situated in Long Island City, on the first Monday of October, 1923, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

Nathan Burkan, Attorney for Plaintiff. Office and Post Office address: 1451 Broadway, New York City, Manhattan Borough.

To Myron Sulzberger, Esq., Attorney for Defendant, No. 565 Fifth Avenue, New York City.

Dated the 20th day of June, 1923.

Filed, May 16, 1925. Edward W. Cox, Clerk.

Compared. Maher and Murray.

[fol. 45] Admission of Service of Notice of Trial

Service of a notice, of which the within is a copy, admitted this 22nd day of June, 1923.

Myron Sulzberger, Attorney for Defendant.

In Supreme Court, Queens County

[Title omitted]

Minutes of Inquest

Inquest Taken in Trial Term, Part I, of the Supreme Court of Queens County, Before Honorable James C. Cropsey, Justice, Presiding, on the 15th Day of May, 1925

[fol. 46] Appearances:

Nathan Burkan for the plaintiff (Louis D. Frohlich, of counsel).

Defendant not appearing.

Direct examination by Louis D. Frohlich:

Q. What is your name?

A. Edward Margolies.

Q. Where do you reside?

A. At No. 30 Hamilton Place, Borough of Manhattan, City of New York.

Q. Are you the plaintiff in this case?

A. I am.

Q. What is your business, Mr. Margolies?

A. I am a builder and general contractor and have been engaged in said business for upwards of twenty-five years.

Q. Do you know the defendant, Morosco Holding Company, Inc.?

A. I do.

Q. What business was the defendant engaged in in 1922?

A. It was engaged in the business of owning and operating theatres in various parts of the United States and in producing plays, and generally engaged in conducting various theatrical enterprises, including the construction, operation and management of theatres.

Q. Mr. Margolies, I show you this paper and ask you whether you recognize the signature at the foot thereof?

A. I do.

Q. Who is George R. Bentzel?

A. He was the vice-president on December 18th, 1922, of the Morosco Holding Company, Inc., the defendant in this action.

Q. Are you familiar with his signature?

A. Yes.

Q. This is his signature (pointing to paper)?

[fol. 47] A. Yes. I was there when he signed it. It was signed in my presence.

Q. Directly underneath his signature is another signature?

A. Yes. It is my signature. I also signed it in Mr. Bentel's presence on the date mentioned in the contract.

Q. Do you recognize the signatures of E. V. Giroux and Eugene H. De Rosa, who signed as witnesses?

A. I do.

Mr. Frohlich: I offer this paper in evidence.

(Paper received and marked Exhibit A.)

Q. Was this paper, Exhibit A, delivered to you on or about December 18th, 1922, by Mr. Bentel?

A. It was. We made two copies, and the one that I have offered in evidence is the one that Mr. Bentel gave me. He kept the other one.

Q. What did you do after Exhibit A was executed and delivered?

A. I sent over foremen, some laborers, etc., to start in the preparation of the job of constructing the theatre in Titusville, Pennsylvania.

Q. When did you, if at all, commence the work of actually constructing that theatre in Titusville, Pa., under the contract, Exhibit A?

A. I spent several weeks in going over the ground, in arranging for workmen, labor and materials and for sub-contractors. I commenced the actual work of construction about January 18th, 1923.

Q. This theatre was to be constructed on a plot of ground in Titusville, Pa.?

A. It was. It was to be on Spring Street, running back along Exchange Place, in Titusville, Pa.

Q. Who was the architect on the job?

A. Eugene De Rosa.

[fol. 48] Q. Where is his office?

A. Mr. De Rosa's office is at No. 110 West 40th Street, in the Borough of Manhattan, City of New York.

Q. Mr. De Rosa was the architect for the defendant, Morosco Holding Company, Inc., was he not?

A. Precisely. He was their architect and he was to generally supervise over the job, and on the tenth of each month he was to examine and approve my requisitions and these requisitions were then to be presented by me to the defendant for payment, according to the terms of the contract.

Q. Under the contract were you obliged to carry Workmen's Compensation Insurance for your workmen?

A. I was, and I was obliged to pay insurance premiums on such insurance.

Q. Were you personally present during the construction of this theatre?

A. I was. I went to the premises at least once a week and saw that everything was being done according to the contract. In addition to that, I had my own personal superintendent, Mr. Ladley, remain on the premises constantly and take care of the job and also take care of all the details connected with it under my general supervision.

Q. I show you this paper, dated April 5th, 1923, and ask you whether you recognize the signature thereon?

A. I do. It is signed in my own handwriting and it is marked "O. K. to pay $6,413.64, $4,923.00, E. De Rosa," in the handwriting of Mr. De Rosa, the defendant's architect on this job.

Q. Is this paper a requisition presented by you, pursuant to the contract?

A. It is and was approved by Mr. De Rosa, after Mr. De Rosa had gone over the job and satisfied himself that all the terms thereof were true and correct.

[fol. 49] Mr. Frohlich: I offer this paper in evidence.

(Paper received in evidence and marked Plaintiff's Exhibit B.)

Q. Look at Plaintiff's Exhibit F. "Amount of work done to date, $5,132.86." What does that mean?

A. It means that I expended for material, time and labor the sum of $5,132.86, in the construction of the foundation for the theatre.

Q. I show you the next item, $1,400. What does that stand for?

A. That stands for insurance premiums that I was compelled to pay to carry Workmen's Compensation Insurance on the job. I employed as many as forty or forty-five men, on the average.

Q. Who made the computations, with respect to profit and overhead?

A. The office of the defendant and Mr. De Rosa, the defendant's architect.

Q. The 5 per cent. overhead was part of your cost of construction work included in that requisition?

A. Yes.

Q. And the profit of 10 per cent. constituted part of the value of the construction work included in that requisition?

A. Yes.

Q. In other words, according to this requisition, you were entitled to receive on April 5th, 1923, from the defendant 85 per cent. of the sum of $7,545.46, amounting to $6,413.64?

A. I was.

Q. Did you present this requisition to the defendant?

A. I presented this requisition to Mr. Bentel, the vice-president of the defendant, and asked him for payment and he refused to give it to me. He said that I would have to wait a few days, because Mr. August Janssen, who was the president of the defendant would have to sign the check and he was not available just then.

[fol. 50] Q. In the meantime, while you were waiting for your money, did you continue with the construction of this theatre under your contract?

A. Yes, I did. I continued the construction of the theatre and continued to pay for the insurance and to do all that was necessary to carry out my contract.

Q. I show you this paper, dated May 10th, 1923, and ask you whether you recognize the signature thereon?

A. I do. It is signed in the handwriting of my secretary, pursuant to my instructions, and it is marked "O. K., Eugene De Rosa."

Q. The signature is that of the defendant's architect?
A. It was signed by him in my presence.

Mr. Frohlich: I offer this paper in evidence.

(Paper received in evidence as Plaintiff's Exhibit C.)

Q. After this paper was signed by the architect, what did you do with it?

A. I presented it to Mr. Bentel and to Mr. Janssen personally, at the office of the Morosco Holding Company, Inc., in New York City. Mr. Bentel and Mr. Janssen were in the room. I walked in and gave them this requisition and I told them that the architect had approved it and stated that I had not received my money on the first requisition. Mr. Janssen stated that he would let me have the money in a day or two as the defendant was a bit pressed for cash.

Q. I call your attention to this requisition and ask you what the amount of work done to date, to wit, $28,340, represents?

A. It means the money I had to pay in the construction of this theatre from the date of the first requisition down to May 10th, 1923.

[fol. 51] Q. What is the item $2,800?

A. It represents insurance premiums paid by me in maintaining Workmen's Compensation Insurance.

Q. The items represented by 10 per cent. profit and 5 per cent. overhead were figured in by whom?

A. By Mr. De Rosa himself.

Q. In addition to the sum $31,340 there was still due and owing to you at that time the amount of the first requisition?

A. There was. That amounted to $6,413.64.

Q. The 5 per cent. overhead was part of your cost of the construction work included in that requisition?

A. Yes.

Q. And the profit of 10 per cent. constituted part of the value of the construction work included in that requisition?

A. Yes.

Q. 85 per cent. of the sum due you on the second requisition was $29,651.64?

A. Yes.

Q. Were you able to go on with the work of construction of that theatre after May, 1923?

A. I was not. I could not pay my men, and I could not pay for materials.

Q. How many years have you been a builder and contractor in the erection of theatres?

A. For over fifteen years.

Q. Have you built many theatres?

A. Yes. I constructed the Plymouth, Broadhurst, Morosco, Bijou, 48th Street, Ambassador, Jolson, Ritz and 49th Street theatres.

Q. You are familiar with the cost of materials, labor and other items going into the construction of theatres?

A. Yes.

Q. If you had been permitted to complete the construction of this theatre in Titusville, Pennsylvania, what would have been the total cost of construction of the same?

A. The total value of the construction work of that theatre would have been $172,000. That sum would include as [fol. 52] part of the value of such construction work a profit of 10 per cent., amounting to $17,200. The sum of $3,607.30 was included in the two requisitions, leaving a balance of $13,592.70, which represents the actual profit that I would have made on the remainder of the work if I had been permitted to complete the same.

Q. Now, the total of the sums in the first cause of action is $36,065.18?

A. Yes.

Q. And the balance of the profits that you would have made is $13,592.70?

A. Yes.

Q. Have you computed the interest on these sums from June 10th, 1923?

A. Yes. The interest is $5,697.65.

Q. What is the total amount due you from the defendant?

A. $55,145.53.

Q. Have you demanded payment from the defendant?

A. I have and I have received nothing.

Q. You demand judgment for $55,145.53?

A. Yes.

Edward Margoles.

Sworn to before me in open court this 15th day of May, 1925. John J. Moran, Special Deputy Clerk, Supreme Court, Queens County, N. Y.

[fol. 53] Louis D. Frohlich, a witness called on behalf of the plaintiff, being first duly sworn, deposes and says:

Direct examination by witness in person:

Q. What is your name and occupation?

A. I am an attorney at law, licensed to practice in the State of New York, and reside at No. 535 West 155th Street, in the Borough of Manhattan, City of New York. I am associated in the practice of law with Nathan Burkan, Esq., who is the attorney of record for the plaintiff in this action and have been associated with Mr. Burkan for upwards of nine years.

Q. Are you familiar with the history of this action?

A. I am. I have had charge of the case from its inception.

Q. When was the matter commenced?

A. This action was commenced in this court in May, 1923. After the service of a summons and complaint upon the defendant, one John Martin Richle was appointed receiver of the defendant in an equity action brought by one Robert L. Hatch against this defendant in the United States District Court for the Southern District of New York. Thereafter, a resettled order was made in the Federal Court, confirming the receivership and making the same permanent during the pendency of that suit, and also staying this plaintiff from continuing with the prosecution of this suit in this court. Thereafter, bankruptcy proceedings were instituted in the United States District Court against this defendant by involuntary petition, but the said petition was subsequently dismissed. Thereafter, this plaintiff moved in the said Federal Court to vacate the stays contained in the or-[fol. 54] ders appointing the receiver, on the ground that the Federal Court had no jurisdiction to make any such orders and to grant any such stays, by reason of the fact that this suit had been commenced in this court, the State

Court, prior to the suit commenced in the Federal Court. The motion came on before Judge Winslow and was denied. An appeal was thereafter taken by this plaintiff to the United States Circuit Court of Appeals for the Second Circuit, and Judge Winslow's order was reversed and the stays were vacated, giving this plaintiff the right to continue the prosecution of this suit to judgment, with the proviso, however, that any judgment obtained in this suit would not necessarily be binding upon the receiver in the Federal suit or upon any Special Master acting upon any claims presented in that suit. I thereupon moved in this court to restore this case to the day calendar for trial, and on April 21st, 1925, Mr. Justice William F. Hagarty made an order granting the plaintiff's motion to reinstate and restore this case, and the case was thereupon added to the calendar of this court for Monday, May 4th, 1925.

I offer in evidence a copy of the order of Mr. Justice William Hagarty, restoring this case, with due proof of service of such order upon F. Wright Moxley, Esq., solicitor for Robert L. Hatch, the plaintiff in the Federal suit, and John Martin Riehle, Esq., receiver of the defendant herein, and also showing on the back thereof the admission of service of Myron Sulzberger, Esq., the attorney of record for the defendant in this action.

(Received in evidence as Exhibit D.)

[fol. 55] Q. Did you do anything else to notify the defendant or any of the parties interested in the defendant, of the restoration of this case to the day calendar of this court?

A. I did. I prepared a formal notice to the effect that this case had been restored to the day calendar for trial for Monday, May 4th, 1925, and that same would be tried.

Q. Did you serve that notice upon the defendant?

A. I served the notice upon defendant's attorney, Myron Sulzberger, Esq., and upon F. Wright Moxley, solicitor for Robert L. Hatch, in the Federal Court, and also on John Martin Riehle.

I offer in evidence the notice of restoration and trial, together with an affidavit of service thereof of David Greenstein, showing personal service of a copy of said notice on F. Wright Moxley, solicitor for Robert L. Hatch, and

John Martin Riehle, receiver of the defendant herein, and also showing admission on the back of such notice of Myron Sulzberger, Esq., attorney for the defendant herein.

Louis D. Frohlich.

Sworn to before me in open court this 15th day of May, 1925. John J. Moran, Special Deputy Clerk, Supreme Court, Queens County, N. Y.

Filed, May 16, 1925. Edward W. Cox, Clerk.

The plaintiff rests.

Compared. Maher and Murray.

[fol. 56] In Supreme Court, Queens County

[Title omitted]

Order Restoring Case to Calendar for Trial—April 21, 1925

Plaintiff having moved to reinstate this case upon the trial calendar of this court for trial, and said motion having come on to be heard on the 21st day of April, 1925,

Now, on reading the notice of motion dated April 15, 1925, the affidavit of Edward Margolies, together with the exhibits annexed thereto, verified April 14th, 1925, together with due proof of service of said papers, and the pleadings herein, all submitted in support of said motion, and after hearing Nathan Burkan, Esq., of counsel for the [fol. 57] plaintiff, in support of said motion, and no one appearing in opposition thereto, and due deliberation having been had thereon, and it being shown to the satisfaction of the Court that the stay of the United States District Court for the Southern District of New York, restraining the further prosecution of this action, has been vacated,

Now on motion of Nathan Burkan, Esq., attorney for the plaintiff, it is

Ordered that said motion be and the same hereby is in all respects granted.

Ordered further that this case be restored to the day calendar for trial for Monday, May 4th, 1925, and the Clerk of this court is hereby instructed to place the same upon the calendar for that date.

Enter.

W. P. H., Justice Supreme Court.

Granted April 21st, 1925. Edward W. Cox, Clerk.

Filed April 22, 1925.

[fol. 38] In Supreme Court, Queens County

[Title omitted]

Affidavit of Service of Papers Generally

State of New York,
City of New York,
County of New York, ss:

David Greenstein, being duly sworn, deposes and says:

That he is over the age of twenty one years.

That on May 1st, 1925, at No. 68 William Street, in the Borough of Manhattan, City of New York, he served the foregoing order restoring case with notice of entry upon F. Wright Mosley, Esq., solicitor for Robert L. Hatch and John Martin Riehle, Esq., trustee of the defendant herein, by delivering to and leaving personally with Mr. A. F. Peters, who is associated with the said F. Wright Mosley, Esq., and who is of suitable age and discretion and who was in charge of said office on said day, a true copy thereof; deponent further says that he knew the person so served [fol. 39] as aforesaid to be the person mentioned and described as the solicitor for said Robert L. Hatch and John Martin Riehle, trustee.

David Greenstein.

Sworn to before me this 1st day of May, 1925.
Lillian Irene Fish, Notary Public, New York Co.
Clerk's No. 68. Reg. No. 3062. Certificate filed in Bronx County. Clerk's No. 12. Register's No. 2750. Commission expires March 30, 1927.

Filed May 16, 1925. Edward Cox, Clerk.

Compared. Maher and Murray.

[fol. 60] In Supreme Court, Queens County

[Title omitted]

Answer—Filed May 16, 1925

The defendant above named by Myron Sulzberger, its attorney, answers the complaint herein as follows:

As to the First Cause of Action

I. It admits that on or about January 18th, 1923, plaintiff caused the work of construction of the theatre and business building to be begun, and except as aforesaid, it denies each and every allegation set forth in paragraph "Fourth" of the complaint.

II. It denies that it has any knowledge or information sufficient to form a belief as to whether the plaintiff presented an itemized requisition to the architect, Eugene De Rosa, and that said requisition was duly approved in writing by said architect, and it denies each and every other allegation set forth in paragraph "Fifth" of the complaint.

[fol. 61] III. On information and belief, it denies each and every allegation set forth in paragraph "Sixth" of the complaint.

IV. It denies that it has any knowledge or information sufficient to form a belief, as to whether the plaintiff presented a requisition to the architect, Eugene De Rosa, for the amount of $29,951.54, and that said architect duly approved and certified said requisition in writing; and the defendant denies all the remaining allegations contained in paragraph "Seventh" of the complaint.

V. It denies each and every allegation contained in paragraph "Eighth" of the complaint.

VI. It denies each and every allegation contained in paragraph "Ninth" of the complaint.

VII. It denies each and every allegation contained in paragraph "Tenth" of the complaint.

As to the Second Cause of Action

VIII. It repeats the denials hereinbefore set forth to paragraph "Fourth," "Fifth," "Sixth," "Seventh," "Eighth," "Ninth" and "Tenth" of the complaint in the same manner and to the same effect as therein set forth, and with the same force and effect as though the same were more fully and at length repeated herein.

IX. It denies that it has any knowledge or information as to any of the allegations set forth in paragraph "Twelfth" of the complaint, sufficient to form a belief thereof.

X. It denies that it has any knowledge or information as to any of the allegations set forth in paragraph "Thir-[fol. 62] teenth" of the complaint, sufficient to form a belief thereof.

As a separate and distinct defense and counterclaim to the first and second causes of action set forth in the complaint and to the whole thereof, the defendant further alleges:

XI. That on or about December 18th, 1922, the plaintiff and the defendant entered into the agreement set forth in paragraph "Second" of the complaint, a copy of which is thereto annexed and marked "Exhibit A," in and by which the plaintiff for the sum of $172,880.00 agreed to erect a theatre and business building on the defendant's premises located on Spring Street, running back along Exchange Place, in Titusville, in the State of Pennsylvania, according to certain drawings, specifications and addenda therein more particularly mentioned and described. That in and by said agreement the plaintiff agreed, in Section 6 of said agreement, to complete the several portions and the whole of the work comprehended therein on or before the 15th day of June, 1923; that on or before the 15th day of June, 1923, the plaintiff wholly abandoned said work and refused on his part to keep and perform the terms of the said agreement and refused any longer to be bound thereby; that

the said abandonment of said work and the refusal of the said plaintiff to complete and carry out and perform the terms and provisions of said agreement on his part to be kept and performed, were not caused by or the result of any of the exceptions contained in any of the provisions of the said agreement, which would justify the abandonment of said work of said contract on the part of the plaintiff, or occasion delay in the performance of the contract on the [fol. 63] part of the plaintiff and for which the plaintiff would be entitled to an extension of time to perform his said agreement.

XII. That by reason of the abandonment of the said work by the plaintiff and his refusal to complete the said agreement on his part, the defendant has been damaged in the sum of $150,000.00, which said sum the defendant counterclaims and asks that said sum be set off as against any sum to which the plaintiff may seem entitled.

Wherefore defendant demands judgment that the complaint herein be dismissed, and that it have judgment against the plaintiff for the sum of One Hundred Fifty Thousand Dollars ($150,000.00) the amount of its counterclaim or that said sum be set off as against any sum to which the plaintiff may otherwise seem to be entitled, besides the costs and disbursements of this action.

Myron Sulzberger, Attorney for Defendant. Office & P. O. Address: No. 565 Fifth Avenue, Borough of Manhattan, New York City.

[fol. 64] *Duly sworn to by George R. Bentel. Jurat omitted in printing.*

[File endorsement omitted.]

[fol. 65] In Supreme Court, Queens County

[Title omitted]

Reply—Filed May 16, 1925

The plaintiff herein, by Nathan Burkan, his attorney, for his reply to the counterclaim contained in the defendant's answer:

1. Denies so much of Paragraph XI of said answer which alleges that on or before the 15th day of June, 1923, the plaintiff wholly abandoned said work and refused on his part to keep and perform the terms of the said agreement and refused any longer to be bound thereby; that the said abandonment of said work and the refusal of the said plaintiff to complete and carry out and peform the terms and provisions of said agreement on his part to be kept and performed, were not caused by or the result of any of the exceptions contained in any of the provisions of the said agreement, which would justify the abandonment of said work or said contract on the part of the plaintiff, or occasion delay in the performance of the contract on the [fol. 66] part of the plaintiff and for which the plaintiff would be entitled to an extension of time to perform his said agreement.

2. Denies each and every allegation contained in Paragraph XII of said answer.

Wherefore plaintiff demands judgment dismissing said counterclaim, and for affirmative judgment as prayed for in the complaint.

Nathan Burkan, Attorney for Plaintiff. Office & P. O. Address: 1451 Broadway, Borough of Manhattan, New York City.

[File endorsement omitted.]

Compared. Maher and Murray.

[fol. 67] Duly sworn to by Edward Margolies. Jurat omitted in printing.

[fol. 68] In Supreme Court, Queens County

[Title omitted]

Notice of Trial.

Sirs: Please take notice that the above entitled action has been restored to the Day Calendar for trial for Monday, May 4th, 1925, and that the issues in this action will

be brought on for trial on that day and an inquest taken therein at a Trial Term, Part I, appointed to be held in and for the County of Queens, at the County Court House, in Long Island City, at ten o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, and you and each of you are hereby directed to appear on that day to participate in the trial of said action.

Yours, etc., Nathan Burkan, Attorney for Plaintiff. Office & P. O. address: No. 1451 Broadway, Borough of Manhattan, City of New York.

Dated New York, April 29th, 1925.

[fol. 69] To F. Wright Moxley, Esq., Solicitor for Robert L. Hatch and John Martin Riehle, Esq., receiver, No. 68 William Street, Borough of Manhattan, New York City; John Martin Riehle, Esq., receiver, No. 68 William Street, Borough of Manhattan, City of New York; Myron Sulzberger, Esq., Attorney for Defendant. Office and P. O. address: No. 565 Fifth Avenue, Borough of Manhattan, New York City.

[fol. 70] In Supreme Court, Queens County

[Title omitted]

Affidavit of David Greenstein

State of New York,
City of New York,
County of New York, ss:

David Greenstein, being duly sworn, deposes and says: That he is over the age of twenty-one years.

That on May 1st, 1925, at No. 68 William Street, in the Borough of Manhattan, City of New York, he served the foregoing notice upon F. Wright Moxley, Esq., solicitor for Robert L. Hatch and John Martin Riehle, Esq., Receiver of the defendant herein, by delivering to and leaving personally with Mr. A. F. Paura, who is associated with the said F. Wright Moxley, Esq., and who is of suita-

ble age and discretion and who was in charge of said office on said day, a true copy thereof; deponent further says that he knew the person so served as afore said to be the [fol. 71] person mentioned and described as the solicitor for said Robert L. Hatch and John Martin Riehle, Receiver.

David Greenstein.

Sworn to before me this 11th day of May, 1925. Lillian Irene Fink, Notary Public, New York Co. Clerk's No. 61 Reg. No. 7052. Certificate filed in Bronx County. Clerk's No. 12 Register's No. 2750. Commission expires March 30, 1927.

Filed May 16, 1925. Edward W. Cox, Clerk.

Compared. Maher and Murray.

[fol. 72] In Supreme Court, Queens County

[Title omitted]

Findings of Fact and Conclusions of Law—Filed May 16, 1925

This action having come on for trial before me at Trial Term, Part I of this court, on the 15th day of May, 1925, and the defendant not having appeared, and an inquest having been taking by me without a jury, and this Court having heard and considered the proofs and evidence offered by the plaintiff, I do make and find the following facts and conclusions of law:

Findings of Fact

1. That at all the time hereinafter mentioned, the defendant was and still is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware.

2. That plaintiff is a builder and general contractor and has been engaged in that business for upwards of twenty-

[fol. 73] five years and has constructed many theatres in the City of New York and elsewhere.

3. That on or about the 18th day of December, 1922, plaintiff and defendant entered into a contract in writing, wherein and whereby the plaintiff agreed to furnish all the materials and perform all the work in the erection af a theatre and business building to be erected on Spring Street and running back along Exchange Place, in the City of Titusville, State of Pennsylvania, in accordance with certain drawings and specifications and general conditions, and to complete the same on or before June 15, 1923, at a cost to the defendant not to exceed $172,000.00.

4. That in and by said agreement it was provided that payments to the plaintiff were to be made on or about the 10th day of each month for 85% of the work and materials on the job, and that proper itemized requisitions were to be presented by the plaintiff on or about the first day of each month to the architect mentioned in said contract, said architect being one Eugene De Rosa of 110 West 40th Street, New York City.

5. That on or about January 18, 1923, plaintiff caused the work of construction of said theatre and business building to be begun, and caused the foundation of such structure to be excavated and laid and the brick work on said building to be erected, and caused other work, labor and services to be rendered thereon and materials furnished in connection therewith, so that up to April 5, 1923, plaintiff had performed or caused to be performed work, labor and services, and had paid insurance premiums, and had fur-[fol. 74] nished materials in the erection of said building, of the fair and reasonable value of $7,545.46.

6. Plaintiff thereupon presented an itemized requisition to the said architect, Eugene De Rosa, on or about April 5, 1923, for said amount of $7,545.46, and said requisition was duly approved in writing by said architect, and plaintiff presented such requisition, duly approved, on April 10, 1923, to the defendant herein and demanded payment of 85% of said sum of $7,545.46, to wit, the sum of $6,413.64, and the defendant failed and refused to pay the same or any part thereof.

7. That plaintiff continued in the performance of said work under said contract after April 5, 1923, and furnished or caused to be furnished work, labor, services and materials in the construction of the said building, and paid insurance premiums thereon down to May 1, 1923, of the fair and reasonable value of $36,197.00.

8. That thereupon, and on or about the 10th day of May, 1923, plaintiff presented a requisition to the said architect, Eugene De Rosa, for the aforesaid amount of $36,197.00, and that said architect duly approved and certified said requisition in writing, and plaintiff thereupon and on or about the 16th day of May, 1923, presented said requisition to the defendant herein and demanded payment of 85% of said sum of $36,197.00, to wit, the sum of $29,651.54, and the defendant then and there failed and refused to pay said sum or any part thereof.

9. That plaintiff has duly performed said contract and each and every term, condition and covenant thereof on his [fol. 75] part to be performed, except in so far as he was prevented from such performance by the acts of defendant, and plaintiff was ready, willing and able to continue to perform the said contract.

10. That it was within the contemplation of this contract that the payments thereon would be made monthly as required therein, in order that the plaintiff would be enabled to pay for the work, labor and services rendered and materials furnished on the job, and that without receiving such payments as and when the same became due, plaintiff has been unable to continue to pay for the work, labor and services rendered and materials furnished thereunder.

11. That the total value of the construction work of the said theatre in Titusville, Pennsylvania, would have been $172,00.00, which sum would include, as part of the value of such construction work, a profit of 10%, amounting to $17,200.00.

12. That if the plaintiff had been permitted to continue the completion of the said theatre, pursuant to said contract, the profit that plaintiff would have made, in addition to the profit set forth and itemized in the first and second requisition, would have amounted to $13,392.70.

13. That the plaintiff has suffered damage in the sum of $36,065.18, being the sums to which he would be entitled under the first and second requisitions, and the sum of $13,-392.70, being the balance of the profits he would have made, making a total of $49,457.88.

14. That the interest on said sum of $49,457.88 from June [fol. 76] 10, 1923, down to the date hereof, amounts to $5,687.65, and the total amount of damage suffered by the plaintiff, including loss of interest, is the sum of $55,145.53.

15. That this action was commenced in May, 1923, by the service of a summons and verified complaint upon the defendant, and that the defendant appeared herein by Myron Sulzberger, its attorney, and that thereafter one John Martin Riehle was appointed Receiver of the defendant in an equity action brought by one Robert L. Hatch against said defendant in the United State District Court for the Southern District of New York.

16. That thereafter a resettled order was made in the said Federal Court, confirming the receivership and making the same permanent during the pendency of the suit therein, and also staying this plaintiff from continuing with the prosecution of this suit in this court.

17. That thereafter bankruptcy proceedings were instituted in the United States District Court against this defendant by involuntary petition, and said petition was subsequently dismissed, and this plaintiff moved in said Federal Court to vacate the stays contained in the orders appointing the Receiver on the ground that the Federal Court had no jurisdiction to make any such orders and to grant any such stays by reason of the fact that this action had been commenced in the State Court prior to the action commenced in the Federal Court; that the motion came on before Judge Winslow and was denied; that an appeal was taken by this plaintiff to the United States Circuit Court of Appeals for the Second Circuit, and Judge Winslow's [fol. 77] order was reversed and the stays were vacated, giving this plaintiff the right to continue the prosecution of this suit to judgment.

18. That plaintiff moved in this court to restore this case to the day calendar for trial, and on April 21, 1925, an order was made in this court granting the plaintiff's motion to reinstate and restore this case, and the case was thereupon added to the calendar of this court for Monday, May 4, 1925, and that a copy of the order of this court restoring this case, with notice of entry, was served upon F. Wright Moxley, Esq., solicitor for Robert L. Hatch, the plaintiff in the federal suit, and on John Martin Riehle, Receiver of the defendant herein in said federal suit, and also on the attorney for the defendant herein, Myron Sulzberger, and that formal notice of the restoration of this case to the day calendar for Monday, May 4, 1925, was served in addition thereto upon said Myron Sulzberger, F. Wright Moxley and John Martin Riehle.

Conclusions of Law

I. That by reason of the failure of the defendant to pay to the plaintiff 85% of the sum due under the first requisition, to wit, $6,413.64, and by reason of the failure of the defendant to pay to the plaintiff 85% of the sum due to the plaintiff under the second requisition, to wit, the sum of $29,651.54, the defendant committed an essential breach of its contract with the plaintiff, and repudiated its contract with the plaintiff, and that by reason of such breach and repudiation on the part of the defendant, the plaintiff has been prevented from further performance of said contract [fol. 78] on his part, and will continue to be prevented from any further performance of said contract on his part.

II. That the plaintiff is entitled to recover of the defendant the sum of $36,065.18, as represented by the first and second requisitions.

III. That plaintiff is entitled to recover of the defendant the profits which he would have earned under the said contract had he been permitted to complete the same, which profits, in addition to so much of the same as are included in the first and second requisitions, amount to $13,392.70.

IV. The plaintiff is entitled to recover interest on said sums of $36,065.18 and $13,392.70 from the 10th day of June, 1923, which interest amounts to $5,687.65.

V. That plaintiff is entitled to recover judgment against the defendant of the aforesaid sums of $36,065.01 and $13,-392.70 and $5,687.65, making a total amount of $55,145.53, and to have execution therefor.

And I hereby direct that judgment be entered in favor of the plaintiff, Edward Margolies, and against the defendant, Morosco Holding Company, Inc., in the sum of $55,145.53, together with costs to be taxed, and that the plaintiff have execution therefor.

Cropsey, J. S. C.

Dated May 15, 1925.

[File endorsement omitted.]

Compared. Maher and Murray.

[fol. 79] AGREEMENT

This agreement, made the eighteenth day of December in the year one thousand nine hundred and 22 by and between Edward Margolies of 19 East 33rd Street, New York City, party of the first part (hereinafter designated the Contractor) and The Morosco Holding Co., Inc., of 217 West 45th St., New York City, party of the second part (hereinafter designated the Owner).

Witnesseth that the Contractor, in consideration of the agreements herein made by the Owner, agree with the said Owner as follows:

Section 1. The Contractor shall and will provide all the materials and perform all the work for the theatre and business building to be erected on Spring Street running back along Exchange Place, Titusville, Pa., in accordance with drawings, Sheets #1 to 18, inclusive and specification pages #1 to 80 inclusive, and also general conditions pages A to D inclusive, and addenda.

All temporary heating and lighting is included in this contract, anything else to the contrary nothwithstanding as shown on the drawings and described in the specifications prepared by Eugene De Rosa, of 110 West 40th Street, New

York City, Architect, which drawings and specifications are identified by the signatures of the parties hereto, and become hereby a part of this contract.

Section 2. It is understood and agreed by and between the parties hereto that the work included in this contract is to be done under the direction of the said Architect, and [fol. 80] that his decision as to the true construction and meaning of the drawings and specifications shall be final. It is also understood and agreed by and between the parties hereto that such additional drawings and explanations as may be necessary to detail and illustrate the work to be done are to be furnished by said Architect, and they agree to conform to and abide by the same so far as they may be consistent with the purpose and intent of the original drawings and specifications referred to in Section 1.

It is further understood and agreed by the parties hereto that any and all drawings and specifications prepared for the purposes of this contract by the said Architect are and remain his property, and that all charges for the use of the same, and for the services of said Architect, are to be paid by the said Owner.

Section 3. No alterations shall be made in the work except upon written order of the Architect; the amount to be paid by the Owner or allowed by the Contractor by virtue of such alterations to be stated in said order. Should the Owner and Contractor not agree as to amount to be paid or allowed, the work shall go on under the order required above, and in case of failure to agree, the determination of said amount shall be referred to arbitration as provided for in Section 12 of this contract.

Section 4. The Contractor shall provide sufficient, safe and proper facilities at all times for the inspection of the work by the Architect or his authorized representatives, shall, within twenty four hours after receiving written notice from the Architect to that effect, proceed to remove [fol. 81] from the grounds or buildings all materials condemned by him, whether worked or unworked, and to take down all portions of the work which the Architect shall by like written notice condemn as unsound or improper, or as in any way failing to conform to the drawings and specifi-

cations, and shall make good all work damaged or destroyed thereby.

Section 5. Should the Contractor at any time refuse or neglect to supply a sufficiency of properly skilled workmen, or of materials of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, such refusal, neglect or failure being certified by the Architect, the Owner shall be at liberty, after three days' written notice to the Contractor, to provide any such labor or materials, and to deduct the cost thereof from any money then due or thereafter to become due to the Contractor under this contract; and if the Architect shall certify that such refusal, neglect or failure is sufficient ground for such action, the Owner shall also be at liberty to terminate the employment of the Contractor for the said work and to enter upon the premises and take possession, for the purpose of completing the work included under this contract, of all materials, tools and appliances thereon, and to employ any other person or persons to finish the work, and to provide the materials therefor; and in case of such discontinuance of the employment of the Contractor shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished, at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the expense incurred by the [fol. 82] Owner in finishing the work, such excess shall be paid by the Owner to the Contractor; but if such expense shall exceed such unpaid balance, the Contractor shall pay the difference to the Owner. The expense incurred by the Owner as herein provided, either for furnishing materials or for finishing the work, and any damage incurred through such default, shall be audited and certified by the Architect, whose certificate thereof shall be conclusive upon the parties.

Section 6. The Contractor shall complete the several portions and the whole of the work comprehended in this Agreement by and at the time or times hereinafter stated, to wit: On or before June 15th, 1927.

The Contractor shall, during the progress of the work and the life of this contract, at his own expense, provide and maintain insurance to hold the Owner free and harmless from any damage or loss sustained by any workman or workmen, person or persons; occasioned by the work or erection of this building or by the performance of this contract. The policies shall be issued by a reliable company and be made payable to the parties hereto as their interests may appear.

Any delay in the performance of this contract by the Contractor occasioned by strikes, fire or acts of God shall not be a breach of or a non-compliance with the terms herein.

In the absence of special plans, it is mutually agreed that this contractor will run the plumbing and drainage pipes in basement in a manner satisfactory to the Architect and the authorities having jurisdiction, to comply with existing conditions on the premises and all local and State laws.

[illegible] Section 7. Should the Contractor be delayed in the prosecution or completion of the work by the act, neglect or default of the Owner, of the Architect, or of any other contractor employed by the Owner upon the work, or by any damage caused by fire or other casualty for which the Contractor is not responsible, or by combined action of workmen so as not caused by or resulting from default or collusion on the part of the Contractor, then the time herein fixed for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all the causes aforesaid, which extended period shall be determined and fixed by the Architect; but no such allowance shall be made unless a claim therefor is presented in writing to the Architect within forty eight hours of the occurrence of such delay.

Section 8. The Owner agrees to provide all labor and materials connected to the conduct of this work not included in this contract in such manner as not to delay its progress, and in the event of failure so to do, thereby causing loss to the Contractor, agrees that [illegible] will reimburse the Contractor for such loss; and the Contractor agrees that if [illegible] shall delay the progress of the work so as to cause loss for which the Owner shall become liable, then [illegible] shall reimburse the Owner for such loss. Should the Owner and Contractor

fail to agree as to the amount of loss comprehended in this Section, the determination of the amount shall be referred to arbitration as provided in Section 12 of this contract.

Section 9. It is hereby mutually agreed between the par- [fol. 86] ties hereto that the sum to be paid by the Owner to the Contractor for said work and materials shall be not in excess of $172,000.00 to complete the building as intended by the specifications and drawings. This amount hereby includes any extra work which may be necessary to complete the building in harmony with the plans and specifications and the conditions found on the premises, but does not include any radical changes or additions that the Owner might desire which are beyond the scope and intention of the plans and specifications as drawn. It is hereby mutually agreed between the parties that should the Owner, architect or contractor effect any saving in the construction of this building below the stated amount herein fixed, such saving being effected by substitutions, omissions or modifications, and same being approved by architect, that in that event the owner and contractor shall share equally in the amount thus saved below the maximum amount of this contract.

The contractor personally guarantees to complete the building in accordance with the plans and specifications herein mentioned for the maximum of one hundred seventy-two thousand dollars ($172,000.00), and that the owner is relieved of any obligation to pay more than this amount subject to additions and deductions as hereinbefore provided, and that such sum shall be paid by the Owner to the Contractor, in current funds, and only upon certificates of the Architect, as follows:

Payments to the contractor shall be made on or about the 20th day of each month for 85% of the work and materials on the job. Proper itemized requisitions shall be presented to the Architect by the Contractor on or about the first day of each month.

[fol. 87] The Owner reserves the right to require from the contractor, from time to time, satisfactory evidence that all workmen, subcontractors, materialmen, etc., are being paid on this operation by the Contractor and a satisfactory accounting shall be furnished the Owner whenever

requested, stating amounts received, amounts paid out and obligations outstanding.

The final payment shall be made within days after the completion of the work included in this contract, and all payments shall be due when certificates for the same are issued. If at any time there shall be evidence of any lien or claim for which, if established, the Owner of the said premises might become liable, and which is chargeable to the Contractor, the Owner shall have the right to retain out of any payment then due or thereafter to become due an amount sufficient to completely indemnify against such lien or claim. Should there prove to be any such claim after all payments are made, the Contractor shall refund to the Owner all moneys that the latter may be compelled to pay in discharging any lien on said premises made obligatory in consequence of the Contract or default.

Section 10. It is further mutually agreed between the parties hereto that no certificate given or payment made under this contract, except the final certificate or final payment, shall be conclusive evidence of the performance of this contract, either wholly or in part, and that no payment shall be construed to be an acceptance of defective work or improper materials.

Section 11. The Owner shall during the progress of the [fol. 86] work maintain insurance on the same against loss or damage by fire, or flood, the policies to cover all work incorporated in the building, and all materials for the same in or about the premises and to be made payable to the parties hereto, as their interest may appear.

Section 12. In case the Owner and Contractor fail to agree in relation to matters of payment, allowance or loss referred to in Sections 3 or 8 of this contract, or should either of them dissent from the decision of the Architect referred to in Section 7 of this contract, which dissent shall have been filed in writing with the Architect within ten days of the announcement of such decision, then the matter shall be referred to a Board of Arbitration to consist of one person selected by the Owner, and one person selected by the Contractor, these two to select a third. The

decision of any two of this Board shall be final and binding on both parties hereto. Each party hereto shall pay one-half of the expense of such reference.

It is hereby understood and this contractor hereby represents that he is fully covered with proper Liability, Accident and Workmen's Compensation Insurance in responsible and acceptable companies and that this contractor hereby agrees to fully indemnify and hold the owners and all other parties and contractors free and harmless from any claim or damages arising through any cause by virtue of the performance of this contract. This contractor further agrees to deliver to the owners within 3 days from the date of the contract proper evidence of the carrying of such insurance.

The said parties for themselves, their heirs, successors, [fol. 87] executors, administrators and assigns, do hereby agree to the full performance of the covenants herein contained.

In witness whereof, the parties to these presents have hereunto set their hands and seals the day and year first above written.

The Morosco Holding Co., Inc., by Geo. R. Bentel, Vice Pres. Edward Margolies, by Edw. Margolies. (Seal of Morosco Holding Co., Inc.)

In presence of E. V. Giroux, Eugene Delph.

[fol. 88] Requisition

Edward Margolies, Real Estate, 19 East 33d Street, New York

Telephone 5450 Murray Hill

April 5th, 1923.

Eugene De Rosa, Esq., #110 West 40th Street, New York City.

Dear Sir: I hereby make following requisition for payment on job #210, Titusville, Pennsylvania, excavating,

foundation and footings, in the amount of $6,413.64, being 85% of the work done as listed below:

Amount of work done to date	$5,132 86
Insurance	1,400 00
	6,532 86
10% profit	653 30
	7,186 16
5% overhead	359 30
	$7,545 46
85% of this requisition	$6,413 64
15% retained	1,131 86

Yours very truly, (Signed) Edw. Margolies.

EM:LC.

O. K. to pay $6,413.64. 4/9/23. (Signed) Eugene De Rosa.

[fol. 89] Requisition

Edward Margolies, Real Estate, 19 East 53d Street, New York

Telephone 5450 Murray Hill

May 10th, 1923.

Eugene De Rosa, Esq., #110 West 40th Street, New York City.

Dear Sir: I hereby make following requisition for payment on job #210, Titusville, Pennsylvania, excavating foundation and footings, in the amount of $28,540.00, being 85% of the work done as listed below:

Amount of work done to date	$28,540 00
Insurance	2,800 00
	31,340 00
10% profit	3,134 00
	34,474 00
5% overhead	1,723 00
	36,197 00

15% retained	5,429 55
85% of this requisition	30,767 45
1st requisition	6,413 64
Due	24,353 81

Yours very truly, (Signed) Edw. Margolies.

EM:LC.

O. K. (Signed) Eugene De Rosa. May 24, 1923.

Filed May 16, 1925. Edward W. Cox, Clerk.
Compared. Maher and Murray.

[fol. 90] In Supreme Court, Queens County

[Title omitted]

Bill of Costs

Costs of Plaintiff

Costs before Notice of Trial	$25 00
Costs after Notice of Trial	15 00
Trial Fee, Issue of Fact	30 00
Examination of Party before Trial	10 00
Term Fees	50 00
	$130 00
Disbursements	8 35
Total	$138 35

Disbursements

Clerk's Fees on Entering Judgment	$2 00
Serving Copy, Summons and Complaint on Defendant	1 50
Satisfaction Piece	50
Transcript and Filing	50

Sheriff's Fees on Execution	2 60
Extract from Minutes	1 25
Total	$8 35

[fol. 91] County of New York,
City of New York, ss:

Louis D. Frohlich, an attorney, associated with Nathan Burkan, the attorney for the plaintiff in the above-entitled action, being duly sworn, says that the foregoing disbursements have been made in said action or may be necessarily made or incurred therein, and that the copies of documents or papers as charged herein were actually and necessarily obtained for use.

Louis D. Frohlich.

Sworn to before me this 15th day of May, 1925. Lillian Irene Fink, Notary Public, New York Co. Clerk's No. 61 Reg. No. 7052. Certificate filed in Bronx County Clerk's No. 12. Register No. 2750. Commission expires March 30, 1927.

[fol. 92] In Supreme Court, Queens County

[Title omitted]

Extract from Minutes—May 15, 1925

The defendant in this action being called, and failing to answer or appearing, on motion of plaintiff's attorney, ordered, that the default of the defendant be and the same is hereby entered;

Whereupon, the pleadings having been examined by the Court, and two witnesses sworn, it is found that the defendant is indebted unto the plaintiff in the sum of $55,145.53 damages.

Ordered, judgment for the plaintiff against the defendant for that amount besides costs.

(Extracts from the Minutes.)

Edward W. Cox, Clerk.

Filed May 16 1925. Edward W. Cox, Clerk.
Compared. Maher and Murray.

[fol. 93] In Supreme Court, Queens County

Edward Margolies, Plaintiff,

against

Morosco Holding Co., Inc., Defendant

Judgment—Field May 16, 1925

The issues in this action having been regularly brought on for trial before Honorable James C. Cropsey, one of the Justices of this court, without a jury, at a Trial Term, Part I thereof, on the 15th day of May, 1925, and the defendant having defaulted and having failed to appear, and the evidence having been adduced by the plaintiff herein, and the Court having made its decision, awarding judgment to the plaintiff and against the defendant in the sum of Fifty-five thousand one hundred and forty-five and 53/100 ($55,-145.53 Dollars, and the plaintiff's costs having been duly taxed in the sum of One hundred thirty-eight and 35/100 Dollars ($138.35),

Now, on motion of Nathan Burkan, attorney for the plaintiff, it is

Ordered, adjudged and decreed that the plaintiff, Edward Margolies, recover of, and have judgment against the defendant, Morosco Holding Co., Inc., in the sum of Fifty-five [fol. 94] thousand one hundred and forty-five and 53/100 ($55,145.53) Dollars, with One hundred thirty-eight 35/100 ($138.35/100) Dollars costs, making in all the sum of Fifty-five thousand two hundred eighty-three and 88/100 ($55,-283.88) Dollars, and that execution issue therefor.

Judgment signed and entered May 16th, 1925, at 11:55 A. M.

Edward W. Cox, Clerk. (Seal.)

Dated New York, May 16th, 1925.

[File endorsement omitted.]

Compared. Maher and Murray.

County Clerk's Office,
State of New York,
County of Queens, ss:

I, Edward W. Cox, Clerk of the County of Queens and of the Courts of Record thereof, do hereby certify that I have

compared the annexed with the original judgment entered in my office May 16, 1925, and that the same is a true transcript thereof, and of the whole of such original.

In testimony whereof, I have hereunto set my hand and affixed the seal of said County and Court this 1 day of June, 1925.

Edward W. Cox, Clerk. (Seal.)

[fol. 95] All of which we have caused by these Presents to be exemplified and the Seal of our said Court for said County to be hereunto affixed.

Witness Hon. William J. Kelly, Presiding Justice of our Supreme Court in and for the Second Judicial Department of said State, this nineteenth day of May, 1925, and in the 148th year of the Independence of the United States.

Edward W. Cox, Clerk.

I, William J. Kelly, Presiding Justice of the Supreme Court of the State of New York in and for the Second Judicial Department thereof, do hereby certify that Edward W. Cox, whose name is subscribed to the preceding exemplification, is the Clerk of the County of Queens, and Clerk of the Supreme Court in and for said County, and that full faith and credit are due to his official acts.

I further certify that the seal affixed to said exemplification is the proper seal of said Court for said County, and that the attestation thereof is in due form of law and by the proper officer.

Witness my hand this 20th day of May, in the year 1925.

William J. Kelly, Presiding Justice of the Supreme Court of the State of New York in and for the Second Judicial Department.

[fol. 96] State of New York,
County of Queens, ss:

I, Edward W. Cox, Clerk of the County of Queens, and also Clerk of the Supreme Court of said County, in and for the Second Judicial Department of said State (said court being a court of record), do hereby certify that Hon. William J. Kelly, whose name is subscribed to the foregoing certificate, is Presiding Justice of the Supreme Court of said State in and for the Second Judicial Department, duly

elected and sworn, and that the signature of said Justice to said certificate is genuine.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said County and Court, this 21st day of May, in the year 1925.

Edward W. Cox, Clerk. (Queens County Seal.)

[fol. 97] In United States District Court, Southern District of New York

Robert L. Hatch, Plaintiff,

against

Morosco Holding Co., Inc., Defendant

Petition for and Order Allowing Appeal

To the Honorable District Judges of the United States Circuit Court of Appeals for the Second Circuit:

John Martin Riehle, Receiver of the Morosco Holding Co., Inc., the defendant in the above-entitled action, feeling aggrieved by that certain order made and entered in the above-entitled action on the 20th day of October, 1927, confirming the report of Bern Budd, Esq., the Special Master herein, and entering a decree thereon, and by that certain intermediate order made and entered the 12th day of July, 1927, in the above-entitled action, vacating an order of this Court in this action dated the 15th day of March, 1926, and referring the claim of Edward Margolies to Bern Budd, Esq., the Special Master herein, does hereby appeal from each of said orders to the United States Circuit Court of Appeals for the Second Circuit, for the reasons set forth in the Assignment of Errors filed herewith, and prays that this appeal be allowed, and that a citation be issued directed to Edward Margolies, one of the claimants in the above-entitled action, commanding him to appear before said Circuit [fol. 98] Court of Appeals and to do and receive what may appertain to justice to be done in the premises; and that a transcript of the record, proceedings and documents upon which the said orders were based and entered, duly authenticated, be sent to the United States Circuit Court of Ap-

peals for the Second Circuit, under the rules of such Court in such cases made and provided.

F. Wright Moxley, Attorney for John Martin Riehle, Receiver. Office & P. O. Address: 1560 Broadway, Borough of Manhattan, City of New York.

Dated New York, November 2nd, 1927.

And now, to wit, on November 11, 1927, it is ordered that the appeal be allowed as prayed for.

Jno. C. Knox, United States District Judge.

[fol. 99] In United States District Court

[Title omitted]

Assignment of Errors

Now comes John Martin Riehle, the Receiver of the Morosco Holding Company, Inc., the defendant above named, and files the following assignment of errors, upon which he will rely upon the prosecution of the appeal in the above enttiled case, from the order made by this Honorable Court on the 20th day of October, 1927, and from that certain intermediate order made by this Court on the 12th day of July, 1927, both duly entered in the office of the Honorable Clerk of this Court:

I. The Court erred in granting the motion made by one of the claimants herein, to wit, Edward Margolies, for an order confirming the report of Bern Budd, Esq., the Special Master herein, dated September 23rd, 1927, and filed on or about said day with the Honorable Clerk of this Court.

II. The Court erred in granting the motion of the aforesaid claimant, Edward Margolies herein, and denying the motion of the Receiver herein, John Martin Riehle, for a rejection of the report of the said Special Master herein, dated September 23rd, 1927, and on or about said date duly filed in the office of the Honorable Clerk of this Court.

III. That the Court erred in confirming the finding of the Special Master herein to the effect that the said Edward

Margolies was entitled to a claim against the receivership [fol. 100] estate of the defendant, Morosco Holding Company, Inc., in the sum of $55,101.41.

IV. That the Court erred in sustaining the findings of the Special Master to the effect that the Receiver had no right to offer proof upon the question as to the actual amount which the said claimant, Edward Margolies, might properly claim against the Morosco Holding Company, Inc.

V. The Court ererd in holding that the judgment of the Supreme Court of the State of New York, for the County of Queens, was binding and conclusive as a claim upon the Receiver in the equity procedings hereinabove entitled.

Wherefore the appellant prays that the orders appealed from be reversed and that the report of the Special Master be vacated and set aside, disaffirmed and disallowed, and that the Honorable Court below be instructed to refer the claim of Edward Margolies to a Special Master for hearing, and upon said hearing said Receiver shall be entitled to adduce such testimony as shall in his opinion tend to show and to prove that the amount of any claim which the said Edward Margolies may have against the defendant, the Morosco Holding Company, Inc., is in a sum much less than $55,101.41, and that the said Receiver at such a hearing shall be entitled to examine the said Edward Margolies with respect to the said claim upon which the said judgment hereinabove mentioned is based.

F. Wright Moxley, Solicitor for John Martin Riehle, Receiver of Morosco Holding Company, Inc. Office & P. O. address: 1560 Broadway, Borough of Manhattan, City of New York.

[fols. 101 & 102] Citation, in usual form, omitted in printing.

[fols. 103-106] Bond on appeal for $250.00 approved; omitted in printing.

[fol. 107] In United States Circuit Court of Appeals for the Second Circuit

Robert L. Hatch, Plaintiff,

against

Mohawk Holding Company, Inc., Defendant

John Mactan Riehle, Receiver, Appellant,

against

Edward Mannheim, Claimant Appellee

Order Waiving Equity Rule 75

On motion of F. Wright Morley, attorney for the appellant, it is

Ordered that the provisions of Rule 75 of the Rules of Practice in Equity in regard to stating the testimony of witnesses in narrative form be waived, and that the testimony be reproduced in the exact words of the witnesses.

Henry W. Goddard, United States District Judge.

Dated January 6th, 1928.

The entry of the above order is hereby consented to.

F. Wright Morley, Attorney for Appellant. Nathan Burkan, Attorney for Appellee.

U. S. S. District Co., S. D. of N. Y. Filed Jan. 7, 1928.

[fol. 108] In United States District Court

[Title omitted]

Stipulation as to Contents of Record

It is hereby stipulated that the Record on Appeal herein shall contain the following papers:

1. Bill of complaint.

2. Answer.

3. Notice of motion, read in support of motion.

6. Stenographer's minutes of proceedings held before the Special Master.

5. Report of Special Master.

6. Exceptions to report of Special Master.

7. Stenographer's minutes on hearing before Hon. Francis A. Winslow on motion to confirm the Special Master's report.

8. Order of Francis A. Winslow, Judge of the District Court of the United States for the Southern District of New York, dated the 13th day of July, 1927, referring claim of Edward Margolies against Warren Holding Company, Inc., to Special Master for hearing, with instructions as to said Special Master's procedure, being the intermediate order appealed from herein.

[fol. 109] 9. Order of Francis A. Winslow, Judge of the District Court of the United States for the Southern District of New York, dated the 20th day of October, 1927, being the order appealed from herein.

10. Exemplified copy of judgment roll, being a part of the record before the Special Master on the hearing of the claim of Edward Margolies.

11. Petition for and order allowing appeal, dated respectively November 2nd, 1927, and November 10th, 1927.

12. Assignment of errors.

13. Citation.

14. Bond on appeal.

15. Order waiving Equity Rule 75.

16. Stipulation as to contents of record.

17. Stipulation as to correctness of the transcript of the record.

18. Stipulation extending time to file.

19. Stipulation extending time to file.

20. Stipulation extending time to file.

29. Order approving of the record and order the Clerk to certify the same.

31. Certificate of the Clerk as to the correctness of the preparation of the record.

F. Wright Hanby, Attorney for John Martin Riddle, Receiver of Western Holding Company, Appellant.
Nathan Burkan, Attorney for Edward Margolies, Respondent.

Dated New York, January 5, 1920.

[3rd 1921] In Chancery Supreme Court of New York

[Title omitted]

Stipulation as to Record

It is hereby stipulated and agreed that the foregoing record is a true and correct transcript of the record and proceedings had herein and may be certified by the Clerk of the Court and filed in the office of the Clerk of the Court of Appeals.

F. Wright Hanby, Attorney for John Martin Riddle, as Receiver of Western Holding Company, Appellant. Nathan Burkan, Attorney for Edward Margolies, Respondent.

Dated New York, January 5, 1920.

[3rd 1921] In Chancery Supreme Court of New York on Appeal, Second Division

[Title omitted]

Stipulation Extending Time to File

It is hereby stipulated that the time of the defendant-appellant to file his record on appeal in the above-entitled appeal shall be extended for ten days from the 20th day of December, 1921.

Nathan Burkan, Attorney for Defendant-Respondent.
F. Wright Hanby, Attorney for Defendant-Appellant.

Dated December 7, 1921.

So ordered. Alex Gilchrist, Jr., Clerk United States District Court.

Filed December 6, 1927.

[Ed. 112] In United States Circuit Court of Appeals, Second Circuit

[Title omitted]

Stipulation Extending Time to File

It is hereby stipulated that the time of the defendant-appellant to file his record on appeal in the above-entitled appeal shall be extended for twenty days from the 29th day of December, 1927.

Nathan Burkan, Attorney for Claimant-Respondent.
F. Wright Wesley, Attorney for Defendant-Appellant.

Dated December 15th, 1927.

So ordered. Alex Gilchrist, Jr., Clerk United States District Court.

Filed 12/20/27.

[Title 112-A 112] In United States Circuit Court of Appeals, Second Circuit

[Title omitted]

Stipulation Extending Time to File

It is hereby stipulated that the time of the defendant-appellant to file his record on appeal in the above-entitled appeal shall be extended for ten days from the 20th day of January, 1928.

Nathan Burkan, Attorney for Claimant-Respondent.
F. Wright Wesley, Attorney for Defendant-Appellant.

Dated January 9th, 1928.

So ordered: Alex Gilchrist, Jr., Clerk United States District Court.

Filed Jan. 6/28.

[fol. 115] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 116] In United States Circuit Court of Appeals for the Second Circuit, October Term, 1927

No. 294

Argued April 12, 1928. Decided May 7, 1928

Henry L. Hatch, Plaintiff,

v.

Watson Holding Company, Inc., Defendant; Ex Parte Eugene Margolies, Appellee

Appeal from the District Court of the United States for the Southern District of New York

Before L. Hand, Swan, and Augustus N. Hand, Circuit Judges

Opinion

Appeal from a decree of the District Court for the Southern District of New York allowing a claim against a receiver in a creditors' bill.

In Hatch v. Watson Holding Co., Inc. (Ex parte Margolies) 19 F. (2d) 246, this court reversed an order of the District Court expunging the claim now in suit, and held that the judgment recovered in the state court against the defendant was conclusive. Upon the new hearing before the special master Margolies again put in evidence the judgment and rested. The receiver thereupon offered to prove that the claim was less than the amount of the judgment, but the evidence was excluded and the claim fixed in the equity suit in the amount found in the judgment.

The District Court sustained the special master and the receiver appealed.

F. Wright Morley, of New York City, for appellant.
Nathan Burkan, of New York City, for appellee.

Per Curiam: A majority of the court, as it is now constituted, think that our first decision impairs the jurisdiction of the District Court over assets already in its custody when the judgment of the state court was entered. They believe that the liquidation of claims is a part of the distribution of the estate, since it determines how much each creditor shall get, and that the distribution of the estate is part of what is usually understood as jurisdiction over the res. However, the former decision was reached after unusual deliberation and full presentation of all the questions involved. If it is to be changed, only the Supreme Court may do so; in the same case and on the same claim the first ruling must stand.

Order affirmed.

[fol. 117] In United States Circuit Court of Appeals, Second Circuit

Robert L. Hatch, Plaintiff,

v.

Reliance Holding Company, Defendant; J. M. Hanna, Appellant

Appeal from the District Court of the United States for the Southern District of New York

Decree—Filed May 14, 1929

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York and was argued by counsel.

On consideration whereof it is now hereby ordered, adjudged, and decreed that the decree of said District Court be, and it hereby is, affirmed, with costs.

It is further ordered that a Mandate issue to the said District Court of accordance with this decree.

L. H., T. W. S.

[File endorsement omitted.]

[fol. 118] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 119] Supreme Court of the United States

Order Allowing Certiorari—Filed October 22, 1928

The petition here for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 33,656. U. S. Circuit Court of Appeals, Second Circuit. Term No. 347. John Martin Biehle, as receiver in equity of the Morocco Holding Company, Inc., petitioner, vs. Edward Margolies. Petition for writ of certiorari and exhibit thereto. Filed August 14th, 1928. File No. 33,656.

FILED
FEB 26

PETITIONER'S MEMORANDUM OF LAW IN SUPPORT OF PETITION FILED HEREIN ON AUGUST 14, 1928.

Supreme Court of the United States

OCTOBER TERM, 1928

No. 347

JOHN MARTIN RIEHLE, AS RECEIVER IN EQUITY OF THE MOHOSCO HOLDING COMPANY, INC., PETITIONER,

vs.

EDWARD MARCOLIES

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petition for Certiorari filed August 14, 1928.
Certiorari granted October 22, 1928.
(32,656)

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The authorities seem clear on the right of a District Court, in an equity proceeding such as the one in which the matter before this Court arose, to decide for itself the claims urged against the receivership estate 2

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Supreme Court of the United States

OCTOBER TERM, 1928.

No. 347.

JOHN MARTIN RIEHLE, as Receiver in Equity of the Morosco Holding Company, Inc., Petitioner,

vs.

EDWARD MARGOLIES.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITIONER'S MEMORANDUM OF LAW IN SUPPORT OF PETITION FILED HEREIN ON AUGUST 14, 1928.

Certiorari granted October 22, 1928.

(33,656)

The question submitted by the petitioner herein to this Honorable Court is clearly set forth in the petition. It is: Is a judgment obtained in a State Court (against a corporation) subsequent to the appointment of a Receiver in Equity in a proceeding brought in the United States District Court (the action in which such judgment was obtained having been instituted prior to the appointment of such Receiver) binding upon the Receiver, where the United States District Court has, upon application of the judgment-creditor, refused to direct the Receiver to defend the action in the State Court?

The authorities seem clear on the right of a District Court, in an equity proceeding such as the one in which the matter before this Court arose, to decide for itself the claims urged against the receivership estate.

It has been held by the United States Supreme Court that when a corporation is placed in the hands of a Receiver of the United States Court, such appointment draws to the jurisdiction of that Court the control of its assets so far as persons having claims to participate in the distribution of such assets are concerned, and the parties must go into that Court in order to assert their rights, prove their demands, and receive whatever may be due them, on their claim of interest in the estate.

> [illegible] v. [illegible], 139 U. S. 96, at p. 99

The receivership draws to this jurisdiction all litigation necessary to wind up the involved corporation and distribute its assets legally. The constitutional provision for trial by jury does not restrict or affect the jurisdiction of a Chancery Court as it existed at the time of the adoption of the Constitution.

> [illegible] v. [illegible], 92 U. S. 92, at p. 100

It is for the Federal Court, in its discretion, to determine of itself all claims against the Receiver of the corporation, and it may, in the exercise of a proper discretion, have such matters litigated in another tribunal against the Receiver, or it may assume to itself the determination thereof.

> [illegible] v. [illegible], 140 U. S. 91, 97
> [illegible] v. [illegible], 99 U. S. 700
> [illegible], 102 U. S. 112.

In the matter before this Honorable Court, the District Court for the Northern District of New York on two occasions decided that it would be for the best interests of

the enforceability under that the "Bangalore" claim can be law have entered to throughout the equity proceedings be litigated in the United States District Court.

A large part of the claimant-appellee's argument (the petitioner's opponent) is directed towards the contention that the claimant, Bangalore, had a right to obtain his claim to judgment irrespective of the conduct of the federal bankruptcy proceedings. That proposition is not in dispute. The Circuit Court of Appeals for the Second Circuit has so held, as is recorded in the facts set forth in the petition herein, and that question is not here involved. The questions here decided do not in any way affect the judgment which the claimant Bangalore may obtain or attempt to in the State Court (in preference to an adjudication in the Federal Court) in binding upon the Bankrupt which the Bankrupt was bankrupt told by the Circuit Court of Appeals for the Second Circuit and by the District Court that the pendency of the State Court action was an effect of the

The claimant Bangalore also contends which overlook the fact that the costs and attorneys' fees, which have been paid over both to promoters of the United States Court as the time the Bangalore State Court judgment came into existence. The Circuit Court of Appeals itself, in its last opinion (the opinion which is referred to as a "further unpublished opinion" in the petition herein), recognizes the fact that a holding to the effect that a State Court judgment is binding upon the circumstances set forth in the petition herein "requires the jurisdiction of the District Court over cases already in its custody [like the judgment of the State Court was entered]." The Circuit Court of Appeals for the Second Circuit in these two cases indicates that it is now appreciative of the futility of bankruptcy proceedings. The distribution of [illegible], after the United States District Court has taken possession of the assets, is does not affect the right to set aside liens. As a matter of fact, the Circuit Court of Appeals for the Second Circuit, in its opinion, which is printed on page 47 of the Transcript of Record herein,

[illegible] "Then [the Circuit Court of Appeals for the Second Circuit] believes that the liquidation of claims is a part of the distribution of the assets, since it determines how much each creditor shall get, and that the distribution of the assets is part of what is usually understood as jurisdiction over the res."

The adoption of the Circuit Court's doctrine as controlling by this Honorable Tribunal would compel relitigation for all time the possibility of that which should be conclusive once upon becoming finality.

Respectfully submitted,

[illegible]

[illegible]

[illegible]

[redacted]

Supreme Court of the United States

[redacted]

Petition for a Writ of Certiorari

OPINION: The questions of fact and law involved in this appeal have been before the District Court on four occasions. That tribunal has answered itself once; and has expressed doubt as to the correctness of its own decisions on the last occasion rendered by it herein.

In the very early days of the controversy (October, 1925), the Receiver, having become acquainted with the fact, through the service of certain motion papers in an action brought by Edward Margolies against the Mercury Holding Company, Inc., in the Supreme Court, Queens County, State of New York, that said Margolies alleged a claim against the Holding Company, applied for an order allowing Margolies' claim, among others, to a Special Master.

Subsequent to the date that the hearing was extended before the Special Master in the early stages of the proceedings, said Margolies was consistently persistent in his contention that he had never filed a claim up and until the 27th day of November, 1925, at which time he asked the United States District Court for the Southern District of New York to make an order permitting him to file a claim. The Court made an order permitting him to file a claim with the Receiver on or before December 7, 1925.

During the period from November, 1925, up to and including the date of the filing of the claim in December, 1925, Edward Margolies was in no degree with the Receiver on many phases of the receivership administration. He joined with others in attempting to put the company into bankruptcy. He also appeared and was successful in that appeal here on order which enjoined him from continuing the prosecution of the Supreme Court action. He was permitted, on his appeal here on order which enjoined him and others from continuing any Supreme Court litigation, to maintain that litigation and submit his claim to a judgment. On that appeal the Circuit Court of Appeals

the Second Circuit held in its opinion rendered after the argument of February 14, 1923, that "a direction will, however, be included in our mandate and in the order to be entered thereupon, that should any judgment be entered in said action in the State Court, such judgment shall not be taken to be a liquidation of any claim filed or capable of being filed under the judgment-debtor's bill herein or in any way affecting the right of the Receiver to contest the claim so entered in judgment or otherwise. Nothing, however, in our mandate shall be taken to prevent the Court below permitting liquidation of Bangalow claims by suit in the State Court should it deem so to do."

On March 19, 1923, the District Court issued its mandate to the District Court. Thereupon Bangalow moved the District Court for an order directing that his claim be liquidated in the action pending in the State Court and the District Court denied that motion.

The claimant Bangalow then proceeded to reduce his claim to judgment in the New York State Court.

On the argument of the appeal from Judge Francis A. Winslow's order, the Receiver's counsel made an offer to stipulate that the Circuit Court of Appeals what attitude he should take in his capacity as counsel for the Receiver with respect to the litigation then pending against the Bangalow Building Company, Inc., in Queens County. The late Judge Charles H. Hough, sitting in motion[illegible] on the bench at that time, was most emphatic in his statement, which Receiver's counsel believed (and believes) to bar the right to take an instruction, that it was none of the Receiver's counsel's business as to what happened in the Supreme Court in Queens County unless the Court below directed him to liquidate Bangalow claims in that court.

The claimant Bangalow still pursued his Supreme Court remedy after the opinion of the Court above quoted, and obtained a default judgment in Queens County. It is now

merely that this judgment was for Fifty odd thousand Dollars and that the original claim of Margolies was for one hundred seventy four thousand Dollars, despite the fact that the judgment was obtained by default on request. Immediately upon entering this judgment the claimant moved the Circuit Court for a recall of its mandate. The motion then came before the Circuit Court again and the Court denied the motion and counsel for the Receiver especially admits that that motion for recall was tantamount to a motion for reargument of the case as a whole.

Margolies then had made up a copy of the judgment roll and served it upon the Receiver. The Receiver rejected it. Margolies then brought on a hearing on his claim before the Special Master. The Special Master stated that the claim was not before him since the position of the claimant was inconsistent. In other words, the Special Master held that if Margolies had not filed a claim and was not to be considered a claimant at the time the Receiver referred the Margolies claim to him, it was now too late, under the terms of the order of limitation made by the United States District Court for the Southern District of New York, for Margolies to file his claim with the Receiver. Margolies, however, made a motion to open his default before Judge Winslow of the District Court and that motion was granted.

The Special Master followed the opinion of the Circuit Court, which was rendered herein and from which we have quoted above. In these proceedings, as appears from the record, the Receiver elected to try out the issue de novo and the Special Master found that under the Circuit Court's ruling the judgment should not be considered "as in any way affecting the right of the Receiver to contest the claim as entered to judgment de novo."

There was no question at the hearing before the Special Master as to the correctness of the claimant herein. The

claimant's counsel and his associates were present and were very frank and very sincere in their statements that it was their express intention to test out the questions involved in the proceeding in the United States Supreme Court. The judgment was offered as proof of the claim and claim and upon such proof, and there being no intervention, opposition or attempt on the part of the claimant to make any further proof, the claim was dismissed upon the interlocutory opinion of the Circuit Court of Appeals.

Upon this dismissal an order was entered by the United States District Court for the Southern District of New York and the said Court below confirmed the report of the Special Master which by its terms dismissed the Mangolino claim. Thereupon the claimant, Edward Mangolino, again appealed to the Circuit Court. Thereupon, in an opinion rendered by Judge Thomas W. Swan, the Circuit Court reversed itself and stated that its former opinion rendered herein *per curiam*, to the effect that the judgment of the New York Supreme Court "should not affect the right of the Receiver to contest the claim *de novo* was improvidently made." The word "improvidently" is defined in all of the standard dictionaries as "exercising foresight or forethought; cautious." There was also a notation at the bottom of this opinion by Judge Swan to this effect: "Note: The learned Judge Hough did not see this opinion. He dissented from the conclusion and thought the order should be affirmed." A copy of Judge Swan's opinion is annexed hereto for the convenience of this Honorable Court. Upon this opinion of Judge Swan, Judge Winslow was constrained to make an order (Record, p. 31) whereby he instructed and in fact directed the Special Master to accept the judgment roll which represented the recovery of the Mangolino judgment against the Bowers Building Company, Inc., in the Supreme Supreme Court of the State of New York, County of Queens. He then

Held, before whom the claim of Mr. Edward Margulies was then brought on for hearing, found, pursuant to the instructions and, we might say, the commands laid upon him by this order of Judge Winslow, that the judgment of Mr. Margulies was conclusive upon the Receiver and denied the Receiver's counsel the right to introduce any evidence which would in any way tend to show that the claim of Mr. Margulies was less in amount than was indicated by this judgment which he had obtained by default in Queens County in the State of New York. The report of the Special Master was confirmed by an order of the District Court (Record, p. 32), and from this order and the intermediate order (Record, p. 30), which for all practical purposes compelled the Special Master to make his report as he made it, the Receiver appealed, and by his appeal asked the Court to review itself again and was emboldened to make review by the fact that that Court having reviewed itself once, might have, and should have, reviewed itself again, to the end that order and logic might be maintained and that there be not injected into the realm of equity proceedings a doubt as to whether there should ever have been such an institution as an equity receivership created by virtue of the power that Equity has vested in District Courts.

On that appeal the Circuit Court refused to again review itself, but it did, *per curiam*, render this somewhat remarkable opinion:

"CIRCUIT COURT OF APPEALS,

Second Circuit.

May 7, 1928.

No. 294.

Hatch v. Warners Holding Co., Inc.
Ex parte Margulies.

Before L. Hand, Swan, and Augustus N. Hand, Circuit Judges.

Per Curiam. A majority of the court, as it is now constituted, think that our first decision impairs the jurisdiction of the District Court over assets already in its custody when the judgment of the state court was entered. They believe that the liquidation of claims is a part of the distribution of the estate, since it determines how much each creditor shall get, and that the distribution of the estate is part of what is usually understood as jurisdiction over the res. However, the former decision was reached after unusual deliberation and full presentation of all the questions involved. If it is to be changed, only the Supreme Court can do so; in the same case and on the same claim the first ruling must stand.

"Order affirmed."

Petitioner submits that no more compelling reasons could exist for the making of his petition than are revealed by the facts hereinabove set forth. It is instantly apparent from a reading of the Circuit Court's last opinion that

that tribunal, while hesitant to certify the question of law involved, is certainly desirous of having the question passed upon by this Court.

The Circuit Court concedes by Judge Swan's opinion (the second written opinion) that the Receiver of the Kansas Building Company, Inc., and his counsel were in effect directed to disregard the pending action, which the claimant, Sturgeon, had brought in the New York State Supreme Court, in the County of Queens. The opinion also concedes that the master and the District Court followed the directions of the Circuit Court of Appeals. It is apparent, therefore, that the judgment which Sturgeon obtained in the State Court was founded upon his uncontradicted testimony, and the record on appeal in this case shows that the suit which Sturgeon had brought was for the recovery of damages amounting to $[illegible] the judgment was for approximately $[illegible]. It is also apparent that there may be as great a discrepancy between the amount which Mr. Sturgeon would prove if his claim were restored and the amount which he recovered and the amount which he obtained. His action was brought on contract and, therefore, his damages, we may assume, were liquidated at the time the action was brought. The result is that Sturgeon is entitled to be paid out of the assets in the receivership estate the amount which he himself claimed was due him when the matter was first before Mr. Justice Cooper, while all the other creditors of the receivership estate are subjected to the necessity of proving their claims under diligent investigation, inquiry, and, if the occasion demands it, cross-examination on the part of the Receiver. The effect of the Circuit Court's decision is, therefore, clearly inconsistent with its plain intent to still keep Sturgeon within the receivership proceedings and to still permit the amount of claim by the use of the

> the jurisdiction of the appointing court the control of its assets, so far as persons having claims to participate in such assets are concerned, and such persons must go into that court to prove their demands and receive their share of the estate."

The case of *White* v. *Ewing*, 159 U. S. 36, 39, is cited in support of that statement. The Circuit Court, however, then went on to say:

> "But this does not mean that all actions which are pending against the debtor whose property has been taken under receivership must be stayed. The orders of the receivership court which result in a distribution of assets have in reality a two-fold aspect. First, the court determines the existence and amount of the indebtedness owing to the creditor-claimant at the time when the debtor's property was taken under receivership. Allowance of a claim is an adjudication of this issue and is equivalent to a judgment in *personam* against the debtor."

The Circuit Court then made this statement, the purpose of which we humbly submit is not comprehended by us:

> "This is the more obvious when the claim is liquidated in another court by *consent of the receivership court*."

There is no possibility that the Circuit Court was under any misapprehension that the receivership court consented to the liquidation of this claim in another court. But we call attention to this statement in contemplation of the fact that there might have been some misunderstanding on the part of the Circuit Court regarding the circumstances under which the judgment in the State Court was secured. Following the foregoing statements the Circuit Court in its opinion arrives at the very sound conclusion that the net result of "receivership suit" procedure is the issuance

of a decree "*in rem*." The Circuit Court also says "it is equivalent to an execution against the assets to satisfy the judgment *in personam*." The learned Court, however, departs from this sound conclusion, in our humble opinion, when it endeavors to distinguish a suit "to establish a lien upon, or affect possession of, the property which the Federal Court had previously taken under receivership." We submit that the learned Court has overlooked the fact that the very moment the Federal Court takes into its possession assets of the corporation in receivership *every claim subsequently proven becomes a claim in rem*. Here, we believe, rests the reason for the great confusion that has unfortunately surrounded the question involved. The very moment that the United States Court takes into its possession by due process of law, the assets of a corporation in receivership proceedings (which we commonly refer to as a conservation suit), actions *in personam* disappear. The situation then becomes inconsistent with such actions. The United States Court says, in effect: "We have certain assets of this party, who you claim owes you some money, and in so far as these assets are concerned (and no further) you may come in here and file your claim—*your lien*—against these assets. With respect to any other assets that this party may own, we have no interest. We have taken these particular assets because we believe that our intervention will save these assets from dissipation and will effect equity among all of you people who claim an interest therein." In other words, if we interpret the law, and the underlying theory, correctly, the United States Court *issues a blanket execution* and its receiver (as a marshal or sheriff might do) *goes out and levies upon all the property he can find*. Thereafter, claimants who contend that the receivership estate owes them money may come in and file their particular lien against the assets. If, upon inquiry, the receiver finds that

that lien is based upon a valid claim, he so informs the Court and then the individual is given his portion of the whole. We are, of course, using the word "lien" here for the purpose of illustrative argument.

Again, we repeat, that it is in this particular pit of confusion that 90 per cent. of the decisions must fall when properly analyzed.

To continue our argument, we will say, that the Circuit Court has in its statements approached closely the same state of confusion, since it has in effect stated that the allowance of a claim in these equity proceedings is in its nature a decree *in rem*, and in the same breath stated that a distinction should be drawn between suits *in rem* and suits *in personam*.

If Section 265 of the Judicial Code prohibiting the issuance of an injunction by the United States Court, which enjoins actions in the State Court, applies to one type of State Court suit, it must apply to all types. Therefore, the statement in the Circuit Court's former opinion to the effect that "If the state suit seeks to establish a lien upon, or affect possession of, the property which the federal court had previously taken under receivership, the state suit will be stayed," is an erroneous statement of law. It makes no difference what the nature of the suit may be—any decision to the contrary is an unsound one. The only question involved is, who had prior jurisdiction over the assets, and a suit brought in a State Court *to enforce a lien may just as properly go to judgment after the receiver has been appointed as one which merely seeks a judgment in personam*. If, however, the State Court judgment establishing the lien is submitted to the United States District Court, the United States District Court will say: "There is nothing you can do with that judgment to-day. We are in possession of this property and we are administering it." If perchance, it would ap-

pear that counsel in this petition is arrogating to himself the position of an authority, counsel would merely state that he is, to the best of his ability, for the purposes of this petition only, analyzing all decisions which have come to his attention and that he is basing his conclusions largely upon the fact that there is such a recognized thing as Equity Receiverships. The allegations essential in a creditor's bill would be futile mouthings if the law were otherwise than as counsel has above submitted. The decree appointing the receiver would be a futile gesture. It is to eliminate the multiplicity of actions, the diversity of forums, the conflict of laws and the confusion resulting from the helter-skelter activities of attorneys from Bangor, Maine, to Tallahassee, Florida, that the United States Courts have permitted themselves to take possession of assets and thereafter administer them.

It, therefore, appears most conclusively that assuming, as we must assume, the right of the United States Court to take possession of these assets, thereafter *every proceeding is a proceeding in rem*. This must be so because the allowance of a claim, and a dividend of 10 per cent. paid thereon in the equity proceeding, *would not bar the claimant from recovering the other 90 per cent. in the event that the receivership were suddenly lifted*. The payment of a claim in a receivership proceeding is not a payment *pro tanto*. It could not be. There might suddenly turn up, after the receivership had been wound up, millions of dollars of oil lands in a section of the country far removed from the site of the receivership activities. *This would not result in the deprivation of creditors' rights and the sudden rise to affluence of stockholders*. The Circuit Court has properly found that the allowance of a claim in equity proceedings is in the nature of a decree *in rem*, but it has, in our humble opinion, erroneously found that there is any distinction between proceedings initially brought *in rem*

and initially brought *in personam*. Any decsion holding that one suit may go on "concurrently" while another may not, is a decision based on error. All that the framer of such a decision could possibly mean is that the futility of the proceeding *in rem* in the State Court is instantly apparent, while the hope exists that "the full faith and credence" provisions of our Constitution and statutes will make of some value a State Court judgment.

The statements contained in the second of the Circuit Court's opinions (Judge Swan's opinion):

> "Since the appellant was entitled to prosecute his suit, we believe that the judgment roll is entitled to the same credence as federal courts are required to give state judgments in other suits"

and

> "While the judgment roll is conclusive as to the amount found owing to the appellant by the defendant corporation on June 10, 1923,"

and

> "The text writers on the subject have accepted without dissent the doctrine that the judgment is conclusive as to the amount of the debt"

are all so inconsistent with the statements which we have heretofore quoted and which, for the sake of emphasis, we quote again—

> "The judgment creditor must still establish to the satisfaction of the equity court that he is a creditor of the defendant and he must still secure an order entitling him to share in the assets of the receivership"

that we believe the Supreme Court should review this question.

THIRD: A certified copy of the entire record of said case in the said Circuit Court of Appeals is hereby furnished, attached to and made a part of this application, and marked Exhibit A, in compliance with Rule 35 of this Honorable Court.

FOURTH: Your petitioner is advised and believes that the judgment of affirmance (entered upon the authority of its said opinion) of the United States Circuit Court of Appeals in said case is erroneous, and that this Honorable Court should require the said case to be certified to it for its review and determination in conformity with the provisions of Section 240, Judicial Code.

FIFTH: That the said case was decided in said Circuit Court of Appeals adversely to the interests of those whom the petitioner, as Receiver, represents. That by reason of this decision the Receiver is bound by a *default judgment* for a large sum of money. Furthermore, the Circuit Court of Appeals is itself responsible for the fact that the creditors of the Morosco Holding Company, Inc. (other than the claimant Margolies himself), were not permitted to submit any defense or subject Margolies to any inquiry in the proceedings wherein he secured this large judgment. The question for review is clear, concise and important. In the absence of a direction to liquidate a claim in a forum other than the court of his appointment, is a receiver in equity bound by a judgment secured at a time subsequent to the appointment of the receiver by a creditor who has commenced an action in a state court prior to the appointment of the receiver? In an attempt to vindicate his refusal to appear before a special master, the claimant Margolies has had much to say with respect to his constitutional rights. Petitioner submits that no constitutional question is involved. The Circuit Court of

Appeals in its *first* opinion herein permitted Margolies to proceed to reduce his New York State suit to a judgment and told him when such permission was granted that his judgment would not be taken "as in any way affecting the right of the Receiver to contest the claim so reduced to judgment *de novo*." The Circuit Court, having thereafter come to the opinion that its prior conclusion to the effect that the Receiver might contest the claim *de novo in so far as the assets in his hands were applicable to payment of claims* "was improvidently made," forced the Receiver into a position from which he could not extricate himself. The third, and last, written opinion of the Circuit Court clearly indicates, however, that that Court as then constituted now believes its *second* decision (referred to as "our first decision") "impairs the jurisdiction of the District Court over assets already in its custody *when the judgment of the State Court was entered*." (Italics ours.)

Petitioner submits that the question submitted for review (1) has never been the subject of independent deliberation by this Court; (2) has become a subject of confusion in many of the District Courts; (3) is a question upon which the Circuit Court for the Second Circuit undoubtedly desires enlightenment; (4) is a question which remains in doubt in the Second Circuit; and (5) is a question which should be reviewed by this Court by reason of the unusual circumstances obtaining in connection with the rights of those represented by the petitioner. If the decision of the Circuit Court is not reviewed, it is apparent that those affected here may be the only interests to suffer the results of this decision. The Circuit Court makes itself clear to the effect that this decision probably will affect only this case and this claim. That Court said: "If it (the adverse decision) is to be changed, only the Supreme Court may do so; in the *same* case on the *same* claim the first (Judge Swan's—really the second ruling) ruling must stand."

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding the said Court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case, entitled Robert L. Hatch v. Morosco Holding Co., Inc. (Ex parte Margolies), No. 284, to the end that said case may be reviewed and determined by this Court as provided by Section 240, Judicial Code, or that your petitioner may have such other or further relief or remedy in the premises as this Court may deem appropriate and in conformity with said provision of the Judicial Code, and that the said judgment of the said Circuit Court of Appeals in the said case and every

STATE OF NEW YORK,
COUNTY OF NEW YORK,
SOUTHERN DISTRICT OF NEW YORK, } ss.:

JOHN MARTIN RIEHLE, being duly sworn, deposes and says: That he is the petitioner named in the foregoing petition; that he has read the contents thereof; that the same are true to his own knowledge, except as to those matters therein alleged on information and belief, and as to those matters he believes it to be true.

JOHN MARTIN RIEHLE.

Sworn to before me this
11th day of August, 1928.

ANTHONY F. PAURA,
Notary Public,
Kings County.
Cert. filed in N. Y. County, 352.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding the said Court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case, entitled Robert L. Hatch v. Morosco Holding Co., Inc. (Ex parte Margolies), No. 284, to the end that said case may be reviewed and determined by this Court as provided by Section 240, Judicial Code, or that your petitioner may have such other or further relief or remedy in the premises as this Court may deem appropriate and in conformity with said provision of the Judicial Code, and that the said judgment of the said Circuit Court of Appeals in the said case and every part thereof may be reversed by this Honorable Court.

.....John Marlon Ashley.....

Petitioner.

HARRY F. WHITE,
Attorney,
420 Union Trust Building,
Washington, D. C.

The following is a copy of Judge Swan's opinion referred to in this petition. It is the *second* written opinion rendered by the Circuit Court of Appeals. The opinion upon which the order of affirmance, review of which is sought, was entered is the *third* opinion.

Before: HOUGH, MANTON and SWAN, Circuit Judges.

Appeal from an order entered by the District Court for the Southern District of New York disallowing the claim of Edward Margolies, the appellant.

NATHAN BURKAN, Esq., Attorney for Appellant.
F. WRIGHT MOXLEY, Esq., Attorney for Receiver, Appellee.

SWAN, Circuit Judge:

For an understanding of the problems presented by this appeal it is necessary to state with some detail the preceding steps in this protracted litigation.

In May, 1923, appellant brought suit on a contract against the Morosco Holding Company, a Delaware corporation, in the Supreme Court of Queens County, New York. The defendant appeared and, the issues having been joined, the case was in June noticed for trial at the term to be held in October, 1923.

In July, 1923, a creditors' bill was filed by Robert L. Hatch against Morosco Holding Company in the District Court for the Southern District of New York. A receiver was appointed, and thereafter orders were entered re-

straining the prosecution of suits against the defendant and directing creditors to file their claims with the receiver. Copies of these orders were served on appellant, and his suit in the state court was stayed.

In February, 1924, appellant petitioned the District Court for leave to prosecute his suit in the state court. From an order denying his petition, an appeal was taken to this Court which reversed the order as being in violation of Section 265 of the Judicial Code. The opinion appears in 5 Fed. (2d) 1015, and concludes as follows:

> "A direction will, however, be included in our mandate and in the order to be entered thereupon, that should any judgment be entered in said action in the state court, such judgment shall not be taken to be a liquidation of any claim filed or capable of being filed under the judgment creditors' bill herein, or as in any way affecting the right of the receiver to contest the claim so reduced to judgment de novo. Nothing, however, in our mandate shall be taken to prevent the court below permitting liquidation of Margolies' claim by suit in the state court should it prefer so to do."

After the mandate was issued, the appellant moved in the District Court that the receiver be directed to liquidate appellant's claim in the state suit then pending. This motion was denied. Appellant then caused his state suit to be reinstated upon the trial calendar, and served formal notice thereof upon the receiver and upon the attorney of record for the defendant in said suit. When the case was reached for trial, neither the receiver nor the defendant appeared, and the defendant was defaulted. Proof was made by the appellant, and the state court made findings of fact and of law and entered judgment in his favor for some $55,000 and costs.

After this judgment was obtained, the appellant moved in this court that its mandate be recalled and corrected so that the receiver be not permitted to try de novo the issues of appellant's claim. This motion was denied.

Immediately thereafter the appellant filed in the receivership proceedings its verified proof of claim. The District Court held that he was not too late and ordered a hearing to be had before the special master. The appellant to litigate his claim in the state court, but we told the judgment roll, and rested. The receiver stated that he elected to have the claim tried de novo. The master reported with a recommendation that the claim be dismissed on the opinion of this court. The District Court confirmed the report, and ordered that the appellant's claim be disallowed and dismissed.

The action of the master and of the District Court followed the directions given by this court when the case was formerly before us. Our decision permitted the appellant to litigate his clai min the state court, but we told him, in substance, that the judgment which he might thus obtain would be of no avail to him in the receivership proceedings. The present appeal asks us, in effect, to reconsider this statement as to the limitation upon the effect to be given the state judgment.

It is elementary that the judicial appointment of a receiver for an insolvent corporation draws to the jurisdiction of the appointing court the control of its assets, so far as persons having claims to participate in such assets are concerned, and such persons must go into that court to prove their demands and receive their share of the estate. White v. Ewing, 159 U. S. 36, 39. But this does not mean that all actions which are pending against the debtor whose property has been taken under receivership must be stayed. The orders of the receivership court which result in a distribution of assets have in reality a

two fold aspect. First, the court determines the existence and amount of the indebtedness owing to the creditor-claimant at the time when the debtor's property was taken under receivership. Allowance of a claim is an adjudication of this issue and is equivalent to a judgment in personam against the debtor. This is the more obvious when the claim is liquidated in another court by consent of the receivership court. Second, the court determines the time and the manner in which payment out of the receivership assets shall be made to the creditor whose claim has been allowed. This is in its nature a decree in rem; it is equivalent to an execution against the assets to satisfy the judgment in personam. Bearing in mind this two fold aspect of the receivership, it is easy to classify the federal cases in which injunctions have been granted or refused against maintaining suits in state courts. If the state suit seeks to establish a lien upon, or affect possession of, the property which the federal court had previously taken under receivership, the state suit will be stayed. If, however, the state suit seeks only a judgment in personam, the two may go on concurrently. Oppenheimer v. San Antonio Land &c. Co., 246 Fed. 934 (C. C. A. 5); In re Tyler, 149 U. S. 164; Kline v. Burke Constr. Co., 260 U. S. 226; Lion Bonding Co. v. Karatz, 262 U. S. 77; Havner v. Hegnes, 269 Fed. 537 (C. C. A. 8); International & G. N. Ry. Co. v. Adkins, 14 Fed. (2d) 149 (S. D. Tex.). The prosecution of the pending state suit seeking only a judgment in personam against the defendant corporation did not impair the jurisdiction of the federal court, and, as we held on the former appeal, could not be stayed.

The question remains what effect shall the receivership court give to the state judgment. The judgment creditor must still establish to the satisfaction of the equity court that he is a creditor of the defendant and he must still

secure an order entitling him to share in the assets of the receivership, if any remain undistributed. The question is really one of making proof.

In several cases it has been held that the judgment is conclusive evidence of the existence and amount of the indebtedness. Pine Lake Iron Co. v. LaFayette Car Works, 53 Fed. 853 (C. C. Ind.); Mercantile Trust Co. v. Pittsburgh & W. R. Co., 29 Fed. 732 (C. C. W. D. Pa.); Pringle v. Woolworth, 90 N. Y. 502; Gray v. Taylor, 59 N. J. Eq. 621; St. Louis &c. Ry. v. Green, 183 S. W. 829, 833 (Tex. Civ. App.). The only case which has been found contra is Evans v. Illinois Surety Co., 319 Ill. 105. This decision was rested upon the authority of cases which hold that where the receivership proceedings effect a judicial dissolution of the corporation, a subsequent judgment against it has no force. This is not the situation involved here nor in the other cases above cited. The Illinois decision appears to have confused the two situations and ignored the recognized distinction between them. The text writers on the subject have accepted without dissent the doctrine that the judgment is conclusive as to the amount of the debt though not as to the time or mode of payment. Alderson's Beach on Receivers, Sec. 486; High, Injunctions (4th Ed.), Sec. 318; Tardy's, Smith on Receivers (2d Ed.), Sec. 29.

A somewhat analogous situation is found in cases construing Sec. 66 of the Judicial Code, which gives the right to sue the receiver in respect to his own acts in carrying on business, without previous leave of the equity court—the section concluding with the sentence,

> "But such suit shall be subject to the general equity jurisdiction of the court in which such manager or receiver was appointed so far as the same may be necessary to the ends of justice."

In Willcox v. Jones, 177 Fed. 870 (C. C. A. 4), the receiver was sued in a state court by the administratrix of an engineer employed by the receiver. Judgment was obtained, and the judgment creditor then intervened in the receivership suit, asking for payment of the judgment. On the hearing of the intervening petition, the receiver contended that the judgment was not conclusive and that the equity court had power to inquire de novo into the justice of the cause by virtue of the above quoted proviso of Sec. 66. The court rejected this contention because to so hold would render useless the suitor's right to sue in another court. The proviso was held to be intended to leave the receivership court in undisputed control of the property with power to adjust equities and priorities between claimants. The court quoted the words of Caldwell, J., in Central Trust Co. v. St. Louis, A. & T. Ry. Co., 41 Fed. 551 (C. C. Ark.):

> "The judgment of the state court is conclusive as to the amount of the debt, but the time and mode of its payment must be controlled by the court appointing the receiver."

See in accord, Dillingham v. Hawk, 60 Fed. 494 (C. C. A. 5); Manhattan Trust Co. v. Chicago Elec. Tr. Co., 188 Fed. 1006 (C. C. Ill.); Am. Brake Shoe Co. v. Pere Marquette R. Co., 263 Fed. 237, s. c. 278 Fed. 832; Texas & Pac. Ry. Co. v. Johnson, 151 U. S. 81, 103.

We believe that the cases are rightly decided which apply the same rule to a judgment rendered against the debtor whose property was taken into receivership after the state court had acquired jurisdiction of the parties. To say that Sec. 265 of the Judicial Code prevents the receivership court from staying the state suit but that it may, nevertheless, litigate de novo the very issues decided by the state court, makes of very little value the privi-

lege which that section confers on suitors to continue pending actions. It would be giving the empty shell but retaining the kernel. The federal courts will not entertain the suggestion that their receivers will not obtain justice in the state courts. No end would be served by trying the claim de novo. Since the appellant was entitled to prosecute his suit, we believe that the judgment roll is entitled to the same credence as federal courts are required to give state judgments in other suits. (Rev. Stat., Sec. 905; Galpin v. Page, Fed. Cas. 5206.)

The right of a creditor to continue a pending suit in a state court and to use the judgment in the receivership as conclusive of the fact and amount of indebtedness, will probably not be availed of with great frequency because of the danger that delay in securing the judgment may cause the claimant to be too late to share in the distribution under the receivership. The equity court may, of course, administer the property within its control without regard to creditors whose claims have not been proved and allowed by it. See, Penn. Steel Co. v. N. Y. City Ry. Co., 229 Fed. 120 (C. C. A. 2).

While the judgment roll is conclusive as to the amount found owing to the appellant by the defendant corporation on June 10, 1923, the judgment allows interest from that date until the date of its entry. The date to which interest is to be allowed on claims of creditors sharing in the receivership assets is a matter to be settled by the receivership court. Thomas v. Western Car Co., 149 U. S. 95. The appellant should fare no better in respect to interest by reason of his judgment than he would were his claim proved by other evidence. The proper rebate of interest in favor of the receiver may be made upon the allowance of appellant's claim. Gray v. Taylor, supra. As to costs, see Pine Lake Iron Co. v. LaFayette Car Works, supra.

For the reasons above stated, we believe the direction in our former mandate to the effect that any judgment which the appellant might obtain in his action in the state court should not affect the right of the receiver to contest the claim de novo was improvidently made. The order of the District Court is, therefore, reversed and the cause remanded for further proceedings consistent with this opinion.

Note: The late Judge Hough did not see this opinion. He dissented from the conclusion and thought the order should be affirmed.

Supreme Court,
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CHARLES ELMORE CR
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IN THE

Supreme Court of the United States

No. 347.

ROBERT L. HATCH,

Plaintiff,

against

MOROSCO HOLDING COMPANY, INC.,

Defendant.

JOHN MARTIN RIEHLE, as Receiver,

Petitioner on Appeal,

against

EDWARD MARGOLIES,

Claimant-Appellee.

BRIEF OF EDWARD MARGOLIES, CLAIMANT, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

NATHAN BURKAN,
Solicitor for Edward Margolies, Appellee.

GALLO & ACKERMAN, Inc., 142 Liberty Street. 'Phones—Rector 7252-6.

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Supreme Court of the United States

No. 347.

ROBERT L. HATCH,
Plaintiff,
against
MOROSCO HOLDING COMPANY, INC.,
Defendant.

JOHN MARTIN RIEHLE, as Receiver,
Petitioner on Appeal,
against
EDWARD MARGOLIES,
Claimant-Appellee.

BRIEF OF EDWARD MARGOLIES, CLAIMANT, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement of Facts.

The petitioner seeks to review the decision of the Circuit Court of Appeals, which confirmed the report of the Special Master in an equity receivership, and allowed

the claim of Edward Margolies as a creditor, in the sum of $55,101.41.

The issue is a very simple one, and may be summarized briefly as follows:

Must the United States District Court, after it has appointed a receiver in equity of a corporation, recognize a judgment rendered in a state court in favor of a creditor of the corporation, where the state court action had been commenced prior to the federal court receivership proceedings?

That is all which is involved in this protracted litigation.

The petitioner, the receiver, complains that he was deprived of the right to contest de novo the merits of Margolies' claim against the corporation, and that he was compelled to accept as conclusive and binding a judgment in the aforesaid sum.

Margolies claims that since he brought his action in the state court for money damages, before any proceedings were commenced in the federal court, the latter court is bound to recognize his judgment as conclusive and the receiver could not litigate de novo the merits of Margolies' claim.

The appellant, Edward Margolies, is a builder and contractor; he has built many theatres in New York City and elsewhere (fol. 216).

He entered into a contract with the defendant, Morosco Holding Company, Inc., in which he undertook to erect a theatre for the defendant in Titusville, Pennsylvania, the cost to defendant not to exceed $172,000 (Complaint, fols. 111-112; Findings, fols. 217, 218).

Installment payments which were to become due on requisitions of the architect, were not made by the defendant, and on May 16th, 1923, appellant brought suit against the defendant in the Supreme Court of New York, Queens County, for accrued installments, as well as

profits that he would have earned, and prayed for judgment in the sum of $124,381.00 (fol. 122).

On May 18th, 1923, the summons and complaint in such suit were personally served in the Borough of Manhattan, City of New York, upon the defendant, copies thereof being left with George R. Bentel, its Vice-President (Affidavit of Service, fols. 127-128).

The defendant appeared in the action by Myron Sulzberger, its attorney, whose post-office address is 565 Fifth Avenue, Manhattan, New York City, and interposed an answer in said suit, which answer was verified June 13th, 1923 (Answer, fols. 178 to 192).

The answer contained a counterclaim against the appellant for $150,000.00 for alleged breach of contract and the defendant demanded judgment against the appellant on such counterclaim (fols. 184-188).

The claimant thereupon served a reply (fols. 193-201), and on June 22nd, 1923, he served upon the defendant's attorney a notice of trial for the October, 1923, term (fol. 130). Admission of service of that notice of trial was signed by defendant's attorney, Mr. Sulzberger (fol. 133).

There is no dispute about these facts, and it is manifest that the State Court had full jurisdiction over the defendant in that suit.

Thereafter, and on July 23rd, 1923, the plaintiff in this action, Robert L. Hatch, claiming to be a creditor of the defendant, filed a Bill in Equity in the United States District Court, for the Southern District of New York, against this defendant, praying for the appointment of a Receiver (Bill of Complaint, fol. 1; fol. 27).

On the same day, this defendant filed an answer, admitting the allegations of the complaint and likewise praying for the appointment of a Receiver (Answer, fol. 37.)

Thereupon John Martin Riehle, Esq., petitioner herein, was appointed receiver by District Judge Winslow.

The receiver herein obtained orders restraining Margolies from prosecuting his suit in the State Courts. Thereupon Margolies moved in the District Court that the orders in so far as they restrained him from prosecuting his suit be vacated. That court denied the motion, and Margolies appealed to the Circuit Court of Appeals.

That court reversed the District Court (5 Fed., 2d, 1015), and held that the stays were improperly made. It held, however, that the judgment, when obtained, would not be conclusive and binding on the receiver.

During all this time, the receiver was attempting to get rid of this claimant as a creditor, and he attempted to bring on before a Special Master appointed by the District Court a hearing with respect to Margolies' claim.

Margolies had up to that time filed no claim in the District Court, and had never recognized the right of the District Court to litigate his claim.

He was in the State Court and he was anxious to prosecute his suit to judgment in that court. He served notice of his intention on the receiver after the stay was vacated, but the receiver made no attempt to defend in the State Court nor to obtain a judgment on his counterclaim.

Thereupon Margolies obtained a judgment in the State Court against the Morosco Holding Company, Inc., for $55,283.88.

The receiver had defaulted in the State Court.

The judgment was obtained on May 16, 1925; on May 26, 1925, Margolies, for the first time, appeared and verified his proof of claim against the Morosco Holding Company, Inc.

He was permitted by an order of Judge Winslow to file his claim with the receiver, and upon objections being made to the claim, a hearing was held before the Special Master, Bern Budd, Esq.

Margolies offered in evidence an exemplified copy of his judgment. The receiver elected to try the claim de novo. This Margolies refused to do, stating that he relied on his judgment as a complete adjudication of his claim and of the amount due to him.

Thereupon the Special Master dismissed the claim. The District Court affirmed the proceedings. An appeal was taken to the Circuit Court of Appeals, and that court, in its opinion written by Judge Swan, stated (19 Fed., 2d, 766, at p. 769):

> "For the reasons above stated, we believe the direction in our former mandate to the effect that any judgment which the appellant might obtain in his action in the state court should not affect the right of the receiver to contest the claim de novo was improvidently made."

In its decision that court upheld the contention of Margolies that his judgment in the State Court was a complete adjudication of the amount of his claim, but it made on modification only, and that was with respect to the interest, and it held that the District Court had exclusive right to award the proper amount of interest.

It remanded the proceedings to the District Court and thereupon the District Court made an order on July 12, 1927 (fol. 91), permitting Margolies to prove his claim against the receiver, and directing the Special Master to receive in evidence an exemplified copy of the judgment in the State Court (fol. 96) "as conclusive proof of the claimant's claim against said receiver," but it directed the Special Master to deduct from such judgment the interest and to allow in lieu thereof interest from the date when the exemplified copy of the judgment was first offered in evidence, to wit, December 14, 1925.

In accordance with this order, a hearing was held be-

fore the Special Master, who received in evidence the exemplified copy of the judgment.

The face amount of the judgment was $49,596.23. The Special Master awarded interest on that amount from December 14, 1925, in accordance with the order of the District Court, which interest amounted to $5,505.18, making the total amount $55,101.41 (fol. 77).

A motion was made to confirm the report, and such report was confirmed by order of the District Court dated October 20, 1927 (fol. 98), and the claim of Margolies was allowed in said amount of $55,101.41 (fol. 102).

From the order of the District Court of July 12, 1927, and from the order confirming the report of the Special Master of October 20, 1927, the receiver appealed to the Circuit Court of Appeals.

That court, on May 7, 1928, handed down a Per Curiam opinion affirming the order appealed from (fols. 346-348). The petitioner now seeks a writ of certiorari.

I.

Margolies' claim, having been reduced to judgment in the State Court, the District Court, as well as the Special Master appointed by that Court, and the Receiver, were bound to give full faith and credit to such judgment, and the judgment was admissible in evidence as proof of the appellant's claim.

The Constitution of the United States provides in Article IV, Section 1, as follows:

> "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such

acts, records and proceedings shall be proved and the effect thereof."

Pursuant to that section of the Constitution there was enacted Revised Statute, Section 905, which was later re-enacted into Section 905 of the Revised Statutes. That section is as follows:

"AUTHENTICATION OF LEGISLATIVE ACTS AND PROOF OF JUDICIAL PROCEEDINGS OF STATE, ETC.

"The acts of the legislature of any state or territory or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such state, territory or country affixed thereto. The records and judicial proceedings of the courts of any state or territory, or of any such country, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate that the said attestation is in due form * * *. And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken."

The judgment which was offered in evidence by the appellant was duly exemplified as required by the foregoing statute. It was attested by the clerk (fol. 282), under seal of the court (fol. 282) and there was attached thereto, a certificate of the presiding Justice of the Appellate Division of the Second Department (fols. 284,

285), to the effect that the attestation of the judgment was in due form of law and by the proper officer (fol. 285).

There is no doubt that a judgment by default is as conclusive as a judgment recovered after a contest.

> Last Chance Mining Co. vs. Tyler Co., 157 U. S., 683, 691.

The courts have construed the foregoing article of the Constitution and statute as giving the same conclusive effect to a judgment of a state court in an action in a federal court, sitting in the same state, as would be given to it in the courts of another state.

In Galpin vs. Page, Fed. Cases, 5206, Justice Field said at page 1132:

> "The act of Congress goes perhaps further than the constitutional requirement which relates to the faith and credit to be given in each state to the public acts, records and judicial proceedings of every other state inasmuch as it declares the effect of the records and judicial proceedings of the states when authenticated as provided 'in every court within the United States,' thus making its provisions applicable to the national courts as well as to the courts of the states. The power of Congress to prescribe the manner in which the records of the states shall be proved in the national courts, and the effect which shall be given to them, is independent of the constitutional provision. Still the law is to have the same construction in its application to the national courts as to the state courts."

In Kansas City vs. Morgan, 76 Fed., 429, the court, quoting from the leading case of Pennoyer vs. Neff, 95 U. S., 714, said at page 437:

> "Whilst they (the federal courts) are not foreign tribunals, in their relations to the state courts, they are tribunals of a different sovereignty, exercising a distinct and independent jurisdiction, and are bound to give the judgments of the state courts only the same faith and credit which the courts of another state are bound to give to them."

And in United States vs. Eisenbeis, 112 Fed., 190, the Circuit Court of Appeals for the Ninth Circuit, said at page 195:

> "When the final judgment of a state court is offered in evidence in a suit or proceeding in a court of the United States, its validity cannot be questioned for errors which do not affect the jurisdiction of the court which rendered it."

In Strauss vs. American Publishers Assn., 201 Fed., 306, the plaintiff, having obtained a judgment in the state court for an infringement of common law rights in literary property, subsequently sought to maintain a suit in the federal court for copyright infringement. Circuit Judge Ward held, at page 310:

> "The plaintiffs, having the option to go into either court, chose the state court, and their claim, having been there adjudicated, cannot be presented the second time to any other court. Clabaugh vs. Southern Wholesale Grocers Association (C. C.), 181 Fed., 706. It may be admitted that the state court erroneously held, in view of the subsequent decision of the Supreme Court in Bobbs-Merrill Co. vs. Straus, 210 U. S., 339, 28 Sup. Ct., 722, 52 L. Ed., 1086, that the agreements complained of were valid so far as copyrighted books were concerned, and that

> therefore as a matter of law the plaintiffs could not recover damages in respect to them at any time. Still this question was actually involved in the cause before the state court, which was competent to decide it. Having done so, its judgment is binding in any subsequent action between the same parties for all times. Cromwell vs. Sac County, 94 U. S., 351, 24 L. Ed., 195. If the plaintiffs are entitled to any relief, they can obtain it only in the original action."

In Commercial Electrical Supply Co. vs. Curtis, 288 Fed., 657, Circuit Judge Sanborn of the Eighth Circuit, said at page 660:

> "A final decree or judgment of a court between parties to a suit therein, of whom and concerning the subject-matter of which it has jurisdiction, renders not only every claim and defense which they made and obtained a decision of, but also every claim and defense that they might have made and that the court might have decided in that suit, *res judicata* between them."

In Strauss vs. American Publishers Assn., supra, it was held that the fact that there was an appeal pending from the judgment, did not suspend its operation as an estoppel.

In Manhattan Trust Co. vs. Chicago Electric Traction Co., 188 Fed., 1006, Judge Kohlsaat held that a suit in a state court against a federal court receiver, in which the plaintiff's claim was reduced to judgment, was conclusive and binding in a federal court as to the receiver. He said, that inasmuch as the statute permitted a federal receiver to be sued in a state court, it would be a very useless act to give such permission if the judgment so obtained would not have a binding and conclusive effect in the receivership proceedings (p. 1010).

In Chinn vs. Foster-Milburn Co., 195 Fed., 158, the defendant, sued in the District Court for the Western District of New York, on a judgment which had been obtained against it in the State Court of Kentucky, interposed a plea that the State Court had been without jurisdiction, because the summons in that action had not been served upon the defendant in Kentucky. It was shown, however, that the defendant, after having sought unsuccessfully to quash the service of the summons in the State Court action, had interposed its answer and gone to trial. Judge Hazel held that the question of jurisdiction had been decided against the defendant in the State Court, and that the judgment, being a valid judgment against it in Kentucky, must be given full faith and credit in the Federal Court. He said (p. 163):

> "* * * by answering to the merits and appealing from the judgment to the Court of Appeals of Kentucky, the defendant submitted to the jurisdiction, and is now estopped from questioning the validity of the judgment."

In Glencove Granite Co. vs. City Trust, 118 Fed., 386, the Circuit Court of Appeals for the Third Circuit, quoted from the earlier decision in Cromwell vs. Sac Co. (94 U. S., 351, at 352), as follows (at p. 389):

> "In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding the parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose."

In David Bradley Mfg. Co. vs. Eagle Mfg. Co., 58 Fed., 721, the court said at page 722:

> "Irrespective, however, of any question of pleading, we are of opinion that the former decree was properly before the court, and should be given full effect. The issue involved in this case was novelty of the invention claimed. The former decree was, as has been said, stipulated in evidence by the agreement of the parties, subject only to its materiality. A former decree may be good as a plea in bar, or may be available as evidence. It was said in the Duchess of Kingston's Case, 11 State Tr., 261, 2 Smith, Lead. Cas. (6th Amer. Ed.), 663, that such decree is 'as a plea, a bar, or as evidence, conclusive.' It may, perhaps, be somewhat questionable whether it is correct to say that a party is estopped by a judgment, any more than that he is estopped by a contract. The former decree is not the act of the party, but the solemn adjudication of a judicial tribunal. So far as the party is concerned, he may be permitted to waive the former recovery in his own behalf; but the peace and good order of society are likewise concerned, that there shall be an end to litigation, and that the courts should not be twice vexed with the same controversy, when that controversy has once been solemnly adjudicated. Marsh vs. Pier, 4 Rawle, 288; Kilheffer vs. Herr, 17 Serg. & R., 319.
>
> "However that may be, it is certainly true that, without respect to pleading, wherever a former recovery is properly in evidence—as here it was by agreement of the parties—full effect should be given to it, so far as it bears upon the issue presented. The issue here being novelty of invention, and that fact having been determined by the prior adjudica-

tion, the former decree becomes conclusive evidence of the validity of the patent as between the parties affected by such prior adjudication."

In Clay vs. Deskins, 63 Fed., 330, it was held that, where a state court had decided that the complainants had lost their rights under a contract for the sale of lands, the federal court, in a subsequent suit brought by the same complainants against the defendant, was bound by the prior judgment. Circuit Judge Simonton, writing for the Circuit Court of Appeals of the Fourth Circuit, said at page 332:

> "The supreme court of West Virginia, in a cause between the same parties, relating to the same subject-matter as the suit in the circuit court, has determined that these complainants have lost all rights they may have had under the contract of sale, and that they did not have such an interest in these lands at the date of the sale by the commissioner, Shumate, to W. H. Deskins, as would authorize them to question in a court of equity the validity of the sale. This question is therefore res adjudicata. * * * The decision of the case in the state courts of West Virginia made the matter res adjudicata. Aurora City vs. West, 7 Wall., at page 96. Where the parties are the same, the legal effect of the former judgment is not impaired because the subject of the second suit is different, provided the second suit involves the same title and depends on the same question."

In Stearns vs. Lawrence, 83 Fed., 738, decided by Circuit Judges Taft and Linton and District Judge Charles D. Clark, it was held:

> "A finding made in an action against a bank and its president that the president purchased certain

notes for the bank with knowledge of the condition on which they were given, is conclusive of such fact in a suit brought by a receiver subsequently appointed for the bank to charge the president with losses resulting from his negligent management" (syllabus).

See also:

Susquehanna Coal Co. vs. The Mayor, 184 Fed., 943.

As pointed out subsequently, the statutes which regulate comity are so important that they must be liberally construed.

Harrison vs. Hurst, 59 Fed. 1, 5.

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II.

To refuse to recognize the validity of the judgment of the State Court and its conclusiveness upon the Receiver would be in effect a denial of the jurisdiction of the State Court and nullification of the proceedings in that Court.

Jurisdiction is the power not only to try, but to determine by a valid judgment the issues presented to the Court and to enforce the judgment.

In *Central National Bank* vs. *Stevens*, 169 U. S., 432, 464, it was said:

> "But it has been frequently determined by this Court that the jurisdiction of a court is not exhausted by the rendition of the judgment, but continues until the judgment shall be satisfied."

Thus it was said in *Riggs* vs. *Johnson County*, 6 Wall., 166, that (at p. 187): "Process subsequent to judgment is as essential to jurisdiction as process antecedent, else the judicial power would be incomplete and entirely inadequate to the purposes for which it was conferred by the Constitution."

And in *Amy* vs. *Superisson*, 11 Wall., 136, it was said:

> "• • • the two sets of tribunals—state and national—are as independent as they are separate. Neither can impede or arrest any action the other may take, within the limits of its jurisdiction, for the satisfaction of its judgments and decrees."
>
> "An execution is the end of the law. It gives the successful party the fruits of his judgment." *United States* vs. *Nourse*, 9 Pet., 8, 28.

But it is scarcely necessary to quote authorities to show that to deprive a court of the power to execute its decrees is to essentially impair its jurisdiction.

It was held by the Circuit Court that the District Court was prohibited by Section 265 of the Judicial Code from enjoining the prosecution of the action brought in the State Court by Margolies against the Morosco Holding Company.

This was a recognition of the jurisdiction previously obtained by the State Court over the parties to said action and over the cause of action.

If the State Court had jurisdiction, it had the power to render a valid judgment and to issue process for the enforcement of its judgment.

It has been held that the proceedings of a State Court, which, under Section 165 of the Judicial Code (former Section 720 of the Revised Statutes) shall not be enjoined by any United States Court, include the judgment and the execution issued thereon.

In *Mills* vs. *Provident Life & Trust Co.*, 100 Fed., 344, 346, the Court said:

> "That the levy and sale under an execution issued upon a judgment rendered by a state court is a 'proceeding in the state court within the meaning of this provision of the Revised Statutes, does not, we think, admit of doubt.' "

In *Sargent* vs. *Hilton*, 115 U. S., 348, the same provision was under consideration and it was held that by said provision the Circuit Court was deprived of power to enjoin the sale of lands by a Sheriff under a judgment of a State Court, unless the injunction was authorized by the law relating to proceedings in bankruptcy.

The same view was taken by the Circuit Court of Appeals for the Sixth Circuit in *American Assn.* vs. *Hurst*, 59 Fed., 1, which was decided by Judges Taft and Lurton, and District Judge Severens. Judge Taft writing for the Court, after pointing out the distinction between process directed against any and all property of an individual to satisfy a judgment or order of attachment, said at page 5:

> "In the light of this distinction, it is clear that the act, however tortious, of an executive officer of a court, done under color of its process, is to be regarded as a 'proceeding' of that court, which comity and public policy require courts of concurrent jurisdiction not to interfere with by injunctive or dispossessory process. If this be the rule of comity and public policy in the absence of a statute, it is conclusive in determining the true construction of Section 720, Rev. St., and the meaning of the words used therein, 'proceedings in any court of the state.' That section was passed, not to preserve comity and har-

> monious action between courts of the same sovereign exercising concurrent jurisdiction, but to attain such an end, and prevent unseemly conflict between courts of different sovereigns exercising concurrent jurisdiction over the same territory. *The purpose of the statute is so important that a liberal construction should be given to accomplish it.*"

The same view was taken by the Circuit Court of Appeals for the Third Circuit Court, in the recent decision in *Piedmont Coal Co.* vs. *Hustead*, 294 Fed., 247, 254.

It is true that in the case at bar the property of the judgment debtor was taken into the custody of the United States District Court and its receiver before the appellant recovered his judgment in the State Court, and that, therefore, an execution issued under the judgment could not be levied on the same property.

But that fact does not affect the validity and conclusiveness of the judgment. If the Receiver could refuse to recognize the validity of the judgment, the same result would be accomplished as if proceedings in the State Court had been enjoined.

Section 720 of the Revised Statutes, was enacted, as Judge Taft pointed out in *American Assn.* vs. *Hurst*, supra, to effectuate an important public policy, the same public policy which requires the United States courts to give full faith and credit to the judicial proceedings in each State.

A construction of the law which recognizes the right of a litigant in a State Court to prosecute his remedies free from interference by the national courts, and in the same breath would proclaim that any judgment obtained in the State Court shall be worthless in the national court, destroys that public policy.

In *Dillingham* vs. *Hauk*, 60 Fed., 494, the Circuit Court of Appeals for the Fifth Circuit construed the act of

March 7, 1887 (now Section 66 of the Judicial Code), which permits a receiver appointed by a federal court to be sued in a State Court without leave of the Court that appointed him, but adds that such suits shall be under the general equity jurisdiction of the appointing court. It was held that such supervisory power did not authorize the court appointing the receiver to deny the validity of the judgment; that the time when and the manner in which a judgment against a receiver shall be paid, the adjustment of equities between the several claimants against the property in the hands of the receiver and the just distribution of the funds according to the rights of the several parties interested in it must be subject to the general equity jurisdiction of the Court.

But, it was said at page 497 (italics ours):

> "• • • the right to sue the receiver in the state court would be of little utility if its judgment could be annulled or modified at the discretion of this (federal) court, to which it is presented as a claim against the fund or property in the hands of the receiver. The judgment of the state court is conclusive as to the existence and amount of the appellee's claim, but the time and manner of its payment must be controlled by the court appointing the receiver. *A judgment may be complete and perfect, and have full effect, independent of the right to issue execution*" (citing Justice Story's decision in Mills vs. Duryee, 7 Cranch, 481).

The United States Supreme Court, discussing the same statute, in *Texas & Pacific Ry.* vs. *Johnson*, 151 U. S., 81, at page 103, said:

> "• • • the right to sue without resorting to the appointing court, which involves the right to obtain

> judgment, cannot be assumed to have been practically valueless by the further provision in the same section of the statute which granted it."

As a further reason why United States District Courts cannot be allowed to nullify or modify the judgments of State Courts, it has been frequently pointed out that to do so would amount to the exercise of appellate jurisdiction.

In *Central Trust Co.* vs. *St. Louis, A. & T. Ry. Co.*, 41 Fed., 551, the Circuit Judge directed the receivers of a corporation appointed by the Circuit Court to allow, as of course, judgments obtained in State Courts against the receivers as well as against the corporation as adjudicated claims. The Court was asked to qualify the order as to judgments by a provision that when a judgment was shown to be for a grossly excessive amount, the Court would reduce it to a reasonable sum. As to this request, the Court said, at page 555:

> "The state court has jurisdiction of the parties and of the subject-matter and its judgment against the receiver of this court is as final and conclusive as it is against any other suitor. The right to sue the receiver in the state court would be of little utility, if its judgment could be annulled or modified at the discretion of this court. It is open to the receiver to correct the errors of the inferior courts of the state by an appeal to the Supreme Court. But this court is not invested with appellate or supervisory jurisdiction over the state courts and cannot annul, vacate or modify their judgments."

The above decision was approved by the Circuit Court of Appeals for the Fourth Circuit in *Wilcox* vs. *Jones*, 177 Fed., 870, 874.

In *Rooker* vs. *Fidelity Trust Co.*, 263 U. S., 413, the United States Supreme Court said, at page 416:

> "Under the legislation of Congress no court of the United States other than this Court could entertain a proceeding to reverse or modify the judgment (of the State Court) for errors of that character. To do so would be an exercise of appellate jurisdiction. The jurisdiction possessed by the District Courts is strictly original."

In Essanay Film Co. vs. Kane, 258 U. S., 358, 361, it was said:

> "That appellant's objection to the action sought to be restrained rests upon a fundamental ground and one based upon a provision of the Constitution of the United States, does not render the effort to stay proceedings in the state court any the less inconsistent with §265, Judicial Code. That section would be of little force did it not apply to cases where, save for its prohibition, good ground would exist for enjoining the prosecution of a pending suit. And, as to the federal question involved, Congress at all times, commencing with the first Judiciary Act (September 24, 1789, c. 20, §25, 1 Stat., 73, 85), has maintained upon the statute book such provisions as it deemed needful for reviewing judicial proceedings in the state courts involving a denial of federal rights, but has confined them to a direct review by this court, and deferred this until final judgment or decree in the state court of last resort. At the same time, since 1793, the prohibition of the use of injunction from a federal court to stay proceedings in a state court has been maintained continuously, and has been consistently upheld. Hull vs. Burr, 234 U. S., 712, 723, and cases cited."

III.

The Receiver was bound to recognize the validity of the appellant's claim, even though that claim had been adjudicated in a State Court.

High, in his work "On Receivers," 4th edition, says in §318, page 399:

> "And an action, pending against a corporation at the date of a receivership may proceed to judgment against the corporation, and such judgment will be conclusive against the Receiver of the amount of plaintiff's demand."

In Bank of Bethel vs. Pahquioque Bank, 81 U. S., 383, the court said at page 401:

> "Enough has already been remarked to show that the fourth proposition of the defendants cannot be sustained, as the act of Congress provides that the receiver, in making the basis for a dividend, shall include in the list not only claims proved before him to his satisfaction, *but claims also adjudicated in a court of competent jurisdiction.*
>
> "Attempt is made to show that the adjudicated claims there referred to are only such as had been adjudicated before the receiver was appointed, but the court is of the opinion that such a construction is not warranted either by the language employed, or the subject-matter to which it relates, or the purpose to be accomplished, or by the analogies of the law or the usual rules of interpretation which courts apply in ascertaining the meaning of a legislative provision of a remedial character. Tested by any one or all of these criterions the court is of the

opinion that the construction assumed by the defendants is quite too narrow to carry into effect the intention which the framers of the provision had in view at the time it was adopted. Claims presented by creditors may be proved before the receiver, or they may be put in suit in any court of competent jurisdiction, as a means of establishing their validity and to determine the amount owed by the association, but the judgment when recovered will not give the creditor any lien on the property of the delinquent association, nor secure to the judgment-creditor any preference over other creditors whose claims are proven before the receiver. All alike must await the action of the Comptroller of the Currency, and be content with a just and legal distribution of the proceeds of the assets collected by the receiver and liquidated by the comptroller according to the act of Congress in such case made and provided."

In Calhoun vs. Lanaux, 127 U. S., 634, 639, it was held that this rule was not confined to national banks, but applied still more aptly to other corporations. The court said at page 639:

"In the case of Bank of Bethel vs. Pahquioque Bank, 4 Wall., 383, we decided that suit might be brought in a state court against a national bank, although it had made default in paying its circulating notes and a receiver of a bank had been appointed by the comptroller of the currency. A fortiori, a company may be sued whose assets have been placed in the hands of a receiver in an ordinary suit in chancery."

In Butler vs. Eaton, 141 U. S., 240, the receiver of a national bank sued a stockholder for the amount of a

subscription for new stock. The defendant offered as a bar evidence of a judgment obtained by her in a State Court determining that there was no valid subscription. Such judgment was admitted in evidence in the U. S. Circuit Court and a decision was rendered against the Receiver. The U. S. Supreme Court held, at page 242:

> "At that time this judgment was valid and subsisting. It was not nominally between the same parties, it is true. It was a judgment recovered by May J. Eaton against the Pacific National Bank; whereas the present action is an action between Butler, the receiver of the said bank, and the said Mary J. Eaton. We are inclined to think, however, that the court below was right in determining that the two actions were substantially between the same parties, inasmuch as a receiver of a national bank, in all actions and suits growing out of the transactions of the bank, represents it as fully as an executor represents his testator. We think, therefore, that the evidence of the judgment recovered was properly admitted as a bar to the receiver's title to recover in reference to the new stock."

In Lyon Binding Co. vs. Karatz, 262 U. S., 77, the question was as to the power of the federal court to disregard a judgment of the state court of Nebraska, which had taken hold of certain properties as to which a receiver in the federal court asserted claims.

Mr. Justice Brandies said at page 90:

> "But the judgment of the State Court, which had possession of the *res*, could not be set aside by a collateral attack in the Federal Courts * * *. Nor could it be ignored * * *. Lower Federal Courts are not superior to State Courts."

The case of Pine Lake Iron Co. vs. Lafayette, 53 Fed., 853, is on all fours with the instant case. There, a receiver had been appointed for the defendant in the federal court. The intervenor had commenced an action against the defendant in the New York State Court prior to the receivership. While the Special Master appointed by the federal court was taking proofs of claim, the intervenor recovered his judgment in the New York State Court, and he then asked leave of the Master to put in evidence a transcript of his judgment, claiming that it was conclusive evidence of the amount of his claim.

The Master held that it was neither conclusive, nor prima facie evidence, and upon the merits of the claim reported against the petitioner or intervenor. The courts said at page 853:

> "The authorities cited on the subject recognize the right of one who has commenced a suit before the appointment of a receiver of the debtor's property, to prosecute the action to judgment, and that a judgment so obtained establishes as against the receiver, the rightful amount of the demand."

The court then allowed the petitioner's claim based upon the judgment which he had obtained in the state court.

In a leading case in New York State,—Pringle vs. Woolworth, 90 N. Y., 502, it was held that a judgment obtained in a court against an insurance company in Pennsylvania was binding and conclusive upon the receiver of that insurance company in the State of New York, and recovery was permitted in a second suit brought on the judgment against the receiver.

Chief Justice Andrews said (p. 511):

"The case is analogous to that of a suit brought against a debtor for the recovery of a debt, after a general assignment of his property made to a trustee for the benefit of creditors. The contract between the debtor and creditor would still subsist, and could be enforced by suit against the debtor, and a judgment between the original parties on the contract would necessarily establish the existence and extent of the obligation between them, as well as against a trustee of his estate for the benefit of creditors. Whether it would give a priority in respect to payment of the claim, is another and quite independent question. And in this case the judgment against the company, established as against the receiver the amount of the debt or claim of the plaintiff upon the policy, and the receiver had no right to reagitate questions litigated in the action against the company, or to interpose any defense on the merits which might have been taken in the action in which the judgment was rendered. The receiver holds the property and estate of the corporation as the officer of the court, for the purpose of distribution under the direction of the court among creditors and stockholders, and in the absence of fraud or collusion, neither of which is alleged in respect to the Pennsylvania judgment, the receiver and the other creditors are bound thereby. If any reason existed to question the judgment against the company, it was the duty of the receiver to have applied to the court rendering it, to reopen the judgment, and to be permitted to defend."

That case has always been referred to as leading authority and was cited and relied upon by the Court of Appeals in the later case of Nicholas vs. Lord, 193 N. Y., 388, 395.

IV.

The fact that Margolies' claim was not formally filed with the Receiver until it had been reduced to judgment, did not affect the conclusiveness and binding force of the judgment.

Until Margolies had obtained his judgment, his claim was unliquidated. The Receiver knew all about the claim. There is no pretense on his part that he was ignorant of the fact that appellant had a claim for a substantial amount by reason of the breach of his building contract with the Morosco Holding Co., Inc. The Receiver had full knowledge of the pendency of the suit and the Receiver had succeeded in improperly staying that suit for a period of over a year.

Moreover, Margolies obtained leave from Judge Winslow to file his claim by order dated November 27, 1925, and pursuant to that order the claim was filed on November 30, 1925. Petitioner admits that such an order was made (Petition, p. 4). The Receiver cannot here attack the validity of the order which permitted Margolies to file his claim. Since the claim was duly filed pursuant to the order, the Receiver was bound to accept it as a claim. It was the affirmative duty of the Receiver to receive legitimate claims against the estate. The Receiver owes a duty to creditors as well as to a defendant.

It was said of a receiver in Davis vs. Gray, 16 Wall., 203, at page 217:

> "A receiver is appointed upon a principle of justice for the benefit of all concerned * * *. He is virtually a representative of the court and of all the parties in interest in the litigation wherein he is appointed * * *. He is not appointed for the benefit of either of the parties, but of all concerned."

In Atlantic Trust Co. vs. Chapman, 208 U. S., 360, Mr. Justice Harlan said (p. 370):

"Immediately upon such appointment and after the qualification of the receiver, the property passed into the custody of the law, and thenceforward its administration was wholly under the control of the court by its officer or creature, the receiver. In Booth vs. Clark, 17 How., 322, 331, it was said: 'A receiver is an indifferent person between parties, appointed by the court to receive the rents, issues or profits of land, or other thing in question in this court, pending the suit, where it does not seem reasonable to the court that either party should do it. Wyatt's Prac. Reg., 355. He is an officer of the court; his appointment is provisional. *He is appointed in behalf of all parties, and not of the complainant or of the defendant only. He is appointed for the benefit of all parties who may establish rights in the cause. The money in his hands is in custodia legis for whoever can make out a title to it.* Delaney vs. Mansfield, 1 Hogan, 234. It is the court itself which has the care of the property in dispute. The Receiver is but the creature of the court; he has no powers except such as are conferred upon him by the order of his appointment and the course and practice of the court. Verplanck vs. Mercantile Insurance Company, 2 Paige, C. R., 452.' In Porter vs. Sabin, 149 U. S., 473, 479, the court said: 'When a court exercising jurisdiction in equity appoints a receiver of all the property of a corporation, the court assumes the administration of the estate; the possession of the receiver is the possession of the court; and the court itself holds and administers the estate, through the receiver as its officer, for the benefit of those whom the court shall ultimately adjudge to be entitled to it.'"

Under these circumstances, the Receiver cannot urge laches in filing the claim.

In the case of Pine Lake Iron Co. vs. Lafayette, 53 Fed., 853, the point was made that the petitioner therein had been precluded from filing his claim (in that case, also in the form of a judgment of a state court), because the judgment was obtained after the time set for filing it.

The court held that filing the claim after judgment was not fatal. It said at page 854:

> "He (petitioner) could not present the judgment because that had not been rendered. He might of course have made reference to the suit; but his failure to do so, in view of the admitted fact that the receiver and his counsel had knowledge of the pendency of the suit, was not a waiver of the right to prosecute the action."

In David Bradley Mfg. Co. vs. Eagle Mfg. Co., 57 Fed., 980, the Circuit Court of Appeals for the Seventh Circuit said at page 985:

> "That the decree was interlocutory at the bringing of this suit, and subsequently ripened into a final decree, does not impair its efficacy or conclusiveness when properly presented in this suit. The relative time of institution of suit, or the relative date of final decree, is not of consequence if the merits of the controversy be thereby fully and finally determined, and the record thereof is properly brought to the attention of the court."

V.

The decision of the Circuit Court in Hatch vs. Morosco Holding Company, Inc., reported in 19 Fed., 2d, 766, is correct and should not be disturbed.

The careful consideration which the appeal received is reflected in the able opinion of Judge Swan, particularly in view of the fact that the court was at that time reversing its prior ruling (5 Fed., 2d, 1015), with respect to the conclusiveness and binding effect of the State Court judgment.

On appeal in 5 Fed., 2d, 1015, where this court held that the stays granted against the prosecution of the State Court action were improper, the question of the validity and conclusiveness of the State Court judgment was not involved, because the suit in the State Court had not yet gone to judgment.

The petitioner argues that the force and effect of the decision of the Circuit Court is to interfere with the proper administration of the assets in the receivership proceeding.

Of course, that is not so. All that was decided was that the State Court judgment was binding and conclusive upon the receiver, and that an exemplified copy thereof was sufficient to establish Margolies' claim and his status as a creditor in the estate.

The Circuit Court did not give Margolies the right to do anything that would interfere with the status of the receivership. Margolies asked for no such privilege.

Margolies made no attempt to issue any execution nor to interfere with the administration of the assets now in the hands of the receiver. Consequently, the involved argument of the receiver, in which he seeks to distinguish between a claim in personam and a claim in rem, is purely academic.

Moreover, the argument advanced by the appellant is unsound.

Judge Swan, in his opinion, said that the *allowance* of the claim is equivalent to a judgment in personam against the debtor, but that the *time and manner of payment* of the claim is in its nature a decree in rem (19 Fed., 2d, 768).

The petitioner misquotes Judge Swan, no doubt unintentionally. He says (Petition, p. 12):

> "* * * the Circuit Court has in its statements approached closely the same state of confusion, since it has in effect stated that the allowance of a claim in these equity proceedings is in its nature a decree in rem, and in the same breath stated that a distinction should be drawn between suits in rem and suits in personam."

As pointed out, Judge Swan held that the allowance of a claim is equivalent to a judgment in personam.

CONCLUSION.

This protracted litigation should be brought to an end.

It has taken Margolies several years to prove a claim against this estate. For years this receiver has administered the assets of the Morosco Holding Company, Inc., and by every technicality and artifice he has contrived to keep Margolies from asserting his claim.

Were he actuated by proper motives and fully alive to the interests of the receivership he would have contested Margolies' claim in the State Court, and would have attempted to recover on his counterclaim of $150,000.

Surely the receiver stood at least as good a chance to defend successfully and to recover on his counterclaim before a judge and jury as he did before a Special Master. Why did he avoid a court and jury so consistently?

Respectfully submitted,

NATHAN BURKAN,
Solicitor for Edward Margolies, Appellee.

Office Supreme Co
FILE
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CHARLES ELMORE

Supreme Court of the United States

No. 347.

ROBERT L. HATCH,
Plaintiff,

against

MOROSCO HOLDING COMPANY, INC.,
Defendant.

JOHN MARTIN RIEHLE, as Receiver,
Petitioner,

against

EDWARD MARGOLIES,
Respondent.

BRIEF OF RESPONDENT.

NATHAN BURKAN,
Solicitor for Edward Margolies,
Respondent.

GALLO & ACKERMAN, Inc., 142 Liberty Street, 'Phone—Rector 7257-8.

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Supreme Court of the United States

No. 347.

ROBERT L. HATCH,

Plaintiff,

against

MOROSCO HOLDING COMPANY, INC.,

Defendant.

JOHN MARTIN RIEHLE, as Receiver,

Petitioner,

against

EDWARD MARGOLIES,

Respondent.

BRIEF OF RESPONDENT.

Statement of Facts.

The Petitioner seeks to reverse the decision of the Circuit Court of Appeals for the Second Circuit (26 F. [2d], 247), which affirmed an order of the District Court for the Southern District of New York, confirming the report of the Special Master in an equity receivership, allowing the claim of the respondent as a creditor, in the sum of $55,101.41.

The issue is a very simple one, and may be summarized briefly as follows:

An action is begun in the state court against a corporation for money damages. Pending that action a receiver for the corporation is appointed by the United States District Court on a simple creditors' bill. The action in the state court thereafter proceeds to judgment, the receiver being notified, but refusing to defend. Must the federal court accept the state court judgment as a conclusive liquidation of the claim?

Respondent, a builder, contracted with Morosco Holding Company, Inc. (hereinafter for brevity called "Morosco Company"), to erect a theatre for it in Titusville, Pa., at a cost not to exceed $172,000 (Complaint, fol. 37; Findings, fol. 73).

Morosco Company defaulting in installment payments which accrued under the contract, on May 18th, 1923, respondent brought suit against the Morosco Company in the Supreme Court of New York, Queens County, for accrued installments, as well as profits that he would have earned, and prayed for judgment in the sum of $124,381.00 [fol. 41].

The summons and complaint in such action were personally served upon the Morosco Company in the City of New York on that day [fol. 43], the Morosco Company duly appeared and answered [fols. 60-64] setting up a counterclaim for $150,000 on which it demanded judgment [fols. 62-64]. Respondent served a reply [fol. 65] and notice of trial [fol. 44] service of which was duly admitted [fol. 44].

On July 23rd, 1923, the plaintiff in this suit, Robert L. Hatch, claiming to be a creditor of the Morosco Company, filed a Bill in Equity against it in the United States District Court, for the Southern District of New York, praying for the appointment of a receiver (Bill of Complaint, fol. 1; fol. 9).

On the same day, the Morosco Company filed an answer, admitting the allegations of the complaint and likewise joined in the prayer for the appointment of a receiver (Answer, fol. 13).

Thereupon John M. Riehle, Petitioner herein, was appointed receiver by District Judge Winslow, by an order dated July 1, 1923 [fol. 23].

The Petitioner in such suit secured orders restraining respondent from prosecuting his action in the State Courts. Thereupon respondent moved in the District Court that the orders insofar as they restrained him from prosecuting his action be vacated. That court denied the motion, and respondent appealed to the Circuit Court of Appeals.

That court reversed the District Court (5 F. [2d], 1015), and held that the stays were improperly made. It stated, however, that the judgment, when obtained, would not be conclusive and binding on the receiver, the petitioner.

A Special Master was appointed by the District Court in such suit to hear and determine claims against the Morosco Company.

Respondent had up to that time filed no claim with the receiver in the District Court, and had never recognized the right of the District Court to litigate his claim.

He was in the State Court before the receiver was appointed, and sought to prosecute his action to judgment in that court. He served notice of his intention to try his action in the State Court on the receiver after the stay was vacated (fols. 55, 58), but the receiver made no attempt to defend in the State Court nor to obtain a judgment on his counterclaim.

Thereupon respondent on May 16, 1925 obtained a judgment in the State Court against the Morosco Company for $55,283.88 [fol. 93].

The Petitioner had defaulted in the State Court.

On May 26, 1925, respondent, for the first time, verified his proof of claim against the Morosco Company, and filed it with the Receiver [fol. 24], as he was permitted to do by an order of Judge Winslow [fol. 24]. Upon objections being made to the claim, a hearing was held before the Special Master, Bern Budd, Esq. [fol. 24].

Respondent, in the proceedings before the Master, offered in evidence an exemplified copy of his judgment. The Petitioner elected to try the claim de novo. This respondent refused to do, stating that he relied on his judgment as a complete adjudication of his claim and of the amount due to him.

Thereupon the Special Master dismissed the claim. The District Court affirmed the proceedings. An appeal was taken to the Circuit Court of Appeals, and that court, in its opinion written by Judge Swan, stated (19 F. [2d], 766, at p. 769, May 9, 1927):

> "For the reasons above stated, we believe the direction in our former mandate to the effect that any judgment which the appellant might obtain in his action in the state court should not affect the right of the receiver to contest the claim de novo was improvidently made."

In its decision that court upheld the contention of respondent that his judgment in the State Court was a complete adjudication of the amount of his claim, but it made one modification only, and that was with respect to the interest, and it held that the District Court had exclusive right to award the proper amount of interest.

It remanded the proceedings to the District Court and thereupon the District Court made an order on July 12, 1927 (fol. 31), permitting respondent to prove his claim against the Petitioner, and directing the Special Master to receive in evidence an exemplified copy of the judgment in the State Court (fol. 32) "as conclusive proof

of the claimant's claim against said receiver," but it directed the Special Master to deduct from such judgment the interest and to allow in lieu thereof interest from the date when the exemplified copy of the judgment was first offered in evidence, to wit, December 14, 1925.

In accordance with this order, another hearing was held before the same Special Master, who received in evidence the exemplified copy of the judgment.

The face amount of the judgment was $49,596.23. The Special Master awarded interest on that amount from December 14, 1925, in accordance with the order of the District Court, which interest amounted to $5,505.18, making the total amount $55,101.41 (fol. 26).

The District Court confirmed the Special Master's report on October 20, 1927 (fol. 33), and allowed the claim of respondent in said amount of $55,101.42 (fol. 34).

From the order of the District Court of July 12, 1927, and from the order confirming the report of the Special Master of October 20, 1927, the Petitioner appealed to the Circuit Court of Appeals.

That court, on May 7, 1928, handed down a Per Curiam opinion affirming the order appealed from (fol. 116), 26 F. (2d), 247. A writ of certiorari was granted by this Court on October 22, 1928 (73 L. Ed., 77).

I.

The respondent's claim, having been reduced to judgment in the State Court, the District Court, as well as the Special Master appointed by that Court, and the Petitioner, were bound to give full faith and credit to such judgment, and the judgment was admissible in evidence as proof of the respondent's claim.

The Constitution of the United States provides in Article IV, Section 1, as follows:

"Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved and the effect thereof."

Pursuant to that section of the Constitution there was enacted Act of Cong., May 26, 1790, c. 11, 1 Stat., 122; Act, Mar. 27, 1804, c. 56, §2, 2 Stat., 299, which were later re-enacted into Section 905 of the Revised Statutes. That section is as follows:

"AUTHENTICATION OF LEGISLATIVE ACTS AND PROOF OF JUDICIAL PROCEEDINGS OF STATE, ETC.

"The acts of the legislature of any state or territory or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such state, territory or country affixed thereto. The records and judicial proceedings of the courts of any state or territory, or of any such country, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate that the said attestation is in due form * * *. And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken."

The judgment which was offered in evidence by the respondent was duly exemplified as required by the fore-

going statute. It was attested by the clerk (fol. 94), under seal of the court (fol. 95) and there was attached thereto, a certificate of the presiding Justice of the Appellate Division of the Supreme Court of the Second Department (fol. 95), to the effect that the attestation of the judgment was in due form of law and by the proper officer (fol. 96).

A judgment by default is as conclusive as a judgment recovered after a contest.

> *Last Chance Mining Co.* vs. *Tyler Co.*, 157 U. S., 683, 691.

The courts have construed the foregoing article of the Constitution and statute as giving the same conclusive effect to a judgment of a state court in an action in a federal court, sitting in the same state, as would be given to it in the courts of another state.

> *Galpin* vs. *Page*, Fed. Cases, 5206, at page 1132;
> *Kansas City* vs. *Morgan*, 76 Fed., 429, 437;
> *United States* vs. *Eisenbeis*, 112 Fed., 190, 195;
> *Commercial Electric Supply Co.* vs. *Curtis*, 288 Fed., 657;
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> *Clay* vs. *Deskins*, 63 Fed., 330;
> *Cromwell* vs. *County of Sac*, 94 U. S., 351, 352;
> *Glencove Granite Co.* vs. *City Trust*, 118 Fed., 386, 389;
> *David Bradley Mfg. Co.* vs. *Eagle Mfg. Co.*, 58 Fed., 721, 722.

In *Butler* vs. *Eaton*, 141 U. S., 240, the receiver of a national bank sued a stockholder for the amount of a subscription for new stock. The defendant offered as a bar evidence of a judgment obtained by her in a state court determining that there was no valid subscription.

Such judgment was admitted in evidence in the United States Circuit Court and a decision was rendered against the receiver. This judgment was affirmed by this court.

In *Manhattan Trust Co.* vs. *Chicago Electric Traction Co.*, 188 Fed., 1006, Judge Kohlsaat held that a suit in a state court against a federal court receiver, in which the plaintiff's claim was reduced to judgment, was conclusive and binding in a federal court as to the receiver. He said, that inasmuch as the statute permitted a federal receiver to be sued in a state court, it would be a very useless act to give such permission if the judgment so obtained would not have a binding and conclusive effect in the receivership proceedings (p. 1010).

In *Stearns* vs. *Laurence*, 83 Fed., 738, decided by Circuit Judges Taft and Lurton and District Judge Charles D. Clark, it was held:

> "A finding made in an action against a bank and its president that the president purchased certain notes for the bank with knowledge of the condition on which they were given, is conclusive of such fact in a suit brought by a receiver subsequently appointed for the bank to charge the president with losses resulting from his negligent management" (syllabus).

See also:

> *Susquehanna Coal Co.* vs. *The Mayor*, 184 Fed., 941, 943.

As pointed out subsequently, the statutes which regulate comity are so important that they must be liberally construed.

> *American Ass'n.* vs. *Hurst*, 59 Fed., 1, 5.

See also:

> *Harkin* vs. *Brundage*, 276 U. S., 36.

II.

To refuse to recognize the validity of the judgment of the State Court and its conclusiveness upon the Receiver would be in effect a denial of the jurisdiction of the State Court and nullification of the proceedings in that Court.

Jurisdiction is the power not only to try, but to determine by a valid judgment the issues presented to the court and to enforce the judgment.

> *Central National Bank* vs. *Stevens*, 169 U. S., 432, 464;
> *Riggs* vs. *Johnson County*, 6 Wall., 166, 187;
> *Amy* vs. *Supervisors*, 11 Wall., 136;
> *United States* vs. *Nourse*, 9 Pet., 8, 28.

It was held by the Circuit Court of Appeals in the case at bar that the District Court was prohibited by Section 265 of the Judicial Code from enjoining the prosecution of the action brought in the State Court by respondent against the Morosco Company.

This was a recognition of the jurisdiction previously obtained by the State Court over the parties to said action and over the cause of action.

If the State Court had jurisdiction, it had the power to render a valid judgment and ordinarily to issue process for the enforcement of its judgment.

It has been held that the proceedings of a State Court, which, under Section 265 of the Judicial Code (former Section 720 of the Revised Statutes) shall not be enjoined by any United States Court, include the judgment and the execution issued thereon.

> *Mills* vs. *Provident Life & Trust Co.*, 100 Fed., 344, 346.

In *Sargent* vs. *Helton*, 115 U. S., 348, the same provision was under consideration and it was held that by said provision the Circuit Court was deprived of power to enjoin the sale of lands by a Sheriff under a judgment of a State Court, unless the injunction was authorized by the law relating to proceedings in bankruptcy.

The same view was taken in:

American Assn. vs. *Hurst*, 59 Fed., 1 (C. C. A., 6);

Piedmont Coal Co. vs. *Hustead*, 294 Fed., 247, 254 (C. C. A., 3).

It is true in the case at bar the property of the judgment debtor was taken into the custody of the United States District Court and its receiver before the respondent recovered his judgment in the State Court, and that, therefore, an execution issued under the judgment could not be levied on the same property.

But that fact does not affect the validity and conclusiveness of the judgment. If the receiver could refuse to recognize the validity of the judgment, the same result would be accomplished as if proceedings in the State Court had been enjoined.

Section 720 of the Revised Statutes, was enacted, as Judge Taft pointed out in *American Assn.* vs. *Hurst*, supra, to effectuate an important public policy, the same public policy which requires the United States courts to give full faith and credit to the judicial proceedings in each State.

A construction of the law which recognizes the right of a litigant in a State Court to prosecute his remedies free from interference by the national courts, and in the same breath would proclaim that any judgment obtained in the State Court shall be worthless in the national court, destroys that public policy.

In *Dillingham* vs. *Hawk*, 60 Fed., 494, the Circuit Court of Appeals for the Fifth Circuit construed the act of March 7, 1887 (now Section 66 of the Judicial Code), which permits a receiver appointed by a federal court to be sued in a State Court without leave of the court that appointed him, but adds that such suits shall be under the general equity jurisdiction of the appointing court. It was held that such supervisory power did not authorize the court appointing the receiver to deny the validity of the judgment; that the time when and the manner in which a judgment against a receiver shall be paid, the adjustment of equities between the several claimants against the property in the hands of the receiver and the just distribution of the funds according to the rights of the several parties interested in it must be subject to the general equity jurisdiction of the court.

But, it was said at page 497 (italics ours):

> "• • • the right to sue the receiver in the state court would be of little utility if its judgment could be annulled or modified at the discretion of this (federal) court, to which it is presented as a claim against the fund or property in the hands of the receiver. The judgment of the state court is conclusive as to the existence and amount of the appellee's claim, but the time and manner of its payment must be controlled by the court appointing the receiver. *A judgment may be complete and perfect, and have full effect, independent of the right to issue execution*" (citing Justice Story's decision in *Mills* vs. *Duryee*, 7 Cranch, 481).

This court, discussing the same statute, in *Texas & Pacific Ry.* vs. *Johnson*, 151 U. S., 81, at page 103, said:

> "• • • the right to sue without resorting to the appointing court, which involves the right to obtain

> judgment, cannot be assumed to have been practically valueless by the further provision in the same section of the statute which granted it."

As a further reason why United States District Courts cannot be allowed to nullify or modify the judgments of State Courts, it has been frequently pointed out that to do so would amount to the exercise of appellate jurisdiction.

In *Central Trust Co.* vs. *St. Louis, A. & T. Ry. Co.*, 41 Fed., 551, the Circuit Judge directed the receivers of a corporation appointed by the Circuit Court to allow, as of course, judgments obtained in State Courts against the receivers as well as against the corporation as adjudicated claims. The court was asked to qualify the order as to judgments by a provision that when a judgment was shown to be for a grossly excessive amount, the court would reduce it to a reasonable sum. As to this request, the court said, at page 555:

> "The state court has jurisdiction of the parties and of the subject-matter and its judgment against the receiver of this court is as final and conclusive as it is against any other suitor. The right to sue the receiver in the state court would be of little utility, if its judgment could be annulled or modified at the discretion of this court. It is open to the receiver to correct the errors of the inferior courts of the state by an appeal to the Supreme Court. But this court is not invested with appellate or supervisory jurisdiction over the state courts and cannot annul, vacate or modify their judgments."

This decision was approved in *Wilcox* vs. *Jones*, 177 Fed., 870, 874 (C. C. A., 4).

See also:

Rooker vs. *Fidelity Trust Co.*, 263 U. S., 413, 416;
Essanay Film Co. vs. *Kane*, 258 U. S., 358, 361.

Not only would refusal to recognize the state court judgment as a valid liquidation of the respondent's claim against the receiver result in a nullification of the proceedings in that court despite the express prohibition contained in section 265 of the Judicial Code; but it would moreover encourage a multiplicity of actions and would produce friction and lack of harmony between two courts of concurrent jurisdiction operating in the same territory.

Baer vs. *McCullough*, 176 N. Y., 97, 103.

As a practical matter, viewed from the angle of economy and expediency, the Supreme Court of New York, Queens County, was as well equipped and qualified to liquidate this claim as was any Master appointed by the District Court. This would eliminate the payment of Master's fees, stenographer's minutes, etc. The only expense involved in the trial of the issue was a jury fee. In no event could a trial in the state courts delay liquidation of the estate.

Penn. Steel Co. vs. N. Y. City Ry., 229 Fed., 120 (C. C. A., 2), cited in the opinion of Judge Swan in 19 F. (2d), 766, 769.

And furthermore, it would have secured to the plaintiff his constitutional right to a trial by jury.

III.

The Petitioner was bound to recognize the validity of the respondent's claim even though that claim had been adjudicated in a state court.

The theory of the Petitioner and of the per curiam opinion of May 7, 1928, is unsound.

The Petitioner rests his case solely upon the proposition stated in the *per curiam opinion* (26 F. [2d], 247):

> "That the liquidation of claims is a part of the distribution of the estate since it determines how much each creditor shall get, and that the distribution of the estate is part of what is usually understood as jurisdiction over the res."

The Petitioner assumes this to be a correct statement of the law, and thereupon concludes that the opinion of Judge Swan (19 F. [2d], 766) contains certain inconsistencies.

Conceding that *distribution* is part of the jurisdiction over the *res*, it is submitted that *liquidation of claims* is *not* a part of jurisdiction over the res, rather, that it has always been held to be a part of what is characterized as jurisdiction *in personam*, and that since liquidation of claims does not interfere with the Federal Court's jurisdiction over the *res*, it is within the power of the state court to render a judgment which must be recognized by the receiver as a valid liquidation of the judgment creditor's claim.

It was expressly decided in *Byers* vs. *McAuley*, 149 U. S., 608 (which will be more closely examined infra), that although a Federal Court cannot direct the distribution of an estate administered in the State Probate Court, the Federal Court may, where the proper diversity of citizenship exists, determine the amount to which

a distributee is entitled. In reaching that conclusion Mr. Justice Brewer said at page 619:

> "While the validity of a claim against the receiver may be established in the State Court, the administration of the property in the hands of the receiver remains with the Federal Court whose officer he is, and the amount the claimant will receive from the proceeds of the property in the hands of the receiver is not settled by the State Court, which only determines the validity and extent of the demand, but rests upon the result of the administration, as ordered by the Federal Court."

The doctrine which prohibits one court from interfering with a res in the custody of another court of concurrent jurisdiction is well known to the law, and is by no means limited to receiverships. The same doctrine exists with respect to the administration of decedents' estates.

> *Byers* vs. *McAuley*, 149 U. S., 608;
> *Waterman* vs. *Canal & La. Bk. Co.*, 215 U. S., 33;
> *Gilmore* vs. *Gilmore*, 18 F. (2d), 614.

Yet in those cases the very doctrine contended for by the respondent namely that the state judgment subsequently secured is a binding adjudication as a liquidation of the claim, has been recognized in several cases.

> *Byers* vs. *McAuley*, supra;
> *Allen* vs. *U. S.*, 285 Fed., 678, 684 (c 1);
> *O'Connor* vs. *Slaker*, 22 F. (2d), 147, 149 (c 8);
> *Green's Adm'x.* vs. *Creighton*, 23 How., 90.

In *Byers* vs. *McAuley*, 149 U. S., 608 (supra), the subject was thoroughly considered. There the administra-

tor had a sum of money ready for administration. A hearing was set for Mar. 29, 1887 in the Orphans' Court of Allegheny County in Pennsylvania. On Mar. 28, plaintiffs, non-residents of the State of Pennsylvania, filed a bill in the Federal Court asking that the probate of the will be set aside; that the administrator be enjoined from distributing the estate, and that the surplus be distributed to plaintiffs and to the others entitled thereto. Some of the other persons "entitled thereto" were citizens of Pennsylvania. The lower court determined all the distributees and ordered the administrator to distribute accordingly. On appeal to this court, this decree was reversed. This court held that although it was proper for the federal court to determine the validity and amount of the plaintiff's claim, there being the proper diversity of citizenship, it could not direct the distribution. The former was held not to be an interference with the *res* although the latter would be.

No case has ever held contrary to the above. All the cases ever decided, with the single exception of *Evans* vs. *Illinois Surety Co.*, 319 Ill., 105, have applied that doctrine to facts identical to those at bar. As clearly pointed out by Judge Swan, the decision in the Evans case rested on a misconception. The other cases cited in Judge Swan's opinion squarely uphold the decision below. They are numerous, and well considered.

Pine Lake Iron Co. vs. *La Fayette Car Works*, 53 Fed., 853;

Mercantile Trust Co. vs. *Pittsburgh & W. R. Co.*, 29 Fed., 732;

Pringle vs. *Woolworth*, 90 N. Y., 502;

Taylor vs. *Gray*, 59 N. J. Eq., 621;

St. Louis, etc. Ry. vs. *Green*, 183 S. W., 829, 833 (Tex. Civ. App.).

To the same effect see the following treatises:

Alderson's Beach on Receivers, §486;
High, Injunctions (4th ed.), §318;
Tardy's Smith on Receivers (2d ed.), §29;
1 Clark, Receivers (1918), §705;
3 Street, Federal Eq. Practice (1909), §2569.

Once it is established that the action brought in the State Court in the case at bar was not one *in rem*, it is not possible to hold that the Federal court can ignore the State court's decision so far as it fixes the validity of a claim and the amount due.

There is no constitutional authority for drawing to the Federal courts all controversies in which a Federal receivership is in any way involved.

Calhoun vs. *Lanaux*, 127 U. S., 634;
United States Mortgage Co. vs. *Missouri K. & T. Ry.*, 269 Fed., 497 (C. C. A., 5);
Equitable Trust Co. vs. *Denny*, 24 F. (2d), 169 (C. C. A., 7);
Gableman vs. *Peoria etc. Ry.*, 179 U. S., 335;
Straine vs. *Bradford Savings Bank & T. Co.*, 88 Fed., 571 (C. C. A., Vt.).

In *Calhoun* vs. *Lanaux*, supra, a proceeding was instituted in a state court to cancel a mortgage. Pending the action receivers were appointed for the defendant corporation by the Federal Court. The receivers were notified of the State Court proceeding, but did not defend. The State Court granted a decree cancelling the mortgage. On writ of error it was contended before this court that the appointment of the receiver in the Federal Court ousted the jurisdiction of the State Court. This court affirmed the decision below holding that the jurisdiction of the State Court is concurrent with that of the

Federal Court even after the appointment of the receiver so long as there is no *actual* interference with the *res*.

Mr. Justice Bradley there said (127 U. S., 634, 639):

> "In the case of Bethel vs. Pahquioque Bank, 4 Wall., 383, we decided that suit might be brought in a state court against a national bank, although it had made default in paying its circulating notes and a receiver of a bank had been appointed by the comptroller of the currency. A fortiori, a company may be sued whose assets have been placed in the hands of a receiver in an ordinary suit in chancery."

See also:

> *Butler* vs. *Eaton*, 141 U. S., 240, 242;
> *Lyon Bonding Co.* vs. *Karatz*, 262 U. S., 77, 90.

In Bank of Bethel vs. Pahquioque Bank, 81 U. S., 383, a [illegible] appointed [illegible] National Bank of Bethel, Connecticut, on Feb. 26, 1868. On May 30, 1868, after the receiver disallowed plaintiff's claim, the latter brought an action of assumpsit against the Bethel Bank in the State Court. That court gave judgment to the plaintiff for the full amount of its claim. It was there contended, as here, that after the appointment of the receiver the courts of the United States alone had jurisdiction; that the Bank could not be sued after the appointment of the receiver; and, that the decision of the receiver in disallowing the plaintiff's claim was conclusive on the parties. Nevertheless this court affirmed the decision of the Connecticut Supreme Court. This court considered the following provisions of the act of June 3, 1864 (13 Stat., 99), with respect to actions involving National banks:

SEC. 50. "That on becoming satisfied * * * that any association has refused to pay its circulating notes * * * the Comptroller of the Currency may forthwith appoint a receiver (who shall take possession of all the assets of the association) and upon the order of a court of competent jurisdiction may sell or compound all bad or doubtful debts, and on a like order sell all the real and personal property of such association * * * And from time to time the Comptroller * * * shall make a ratable dividend of the money so paid over to him on all such claims as may have been proved to his satisfaction, or adjudicated in a court of competent jurisdiction."

SEC. 57. "That suits, actions, and proceedings against any association, under this act, may be had in any circuit, district, or territorial court of the United States, held within the district in which such association may be established; or in any state, county, or municipal court in the county or city in which said association is located; having jurisdiction in similar cases. Provided, however, that all proceedings to enjoin the comptroller under this act shall be had in a circuit, district, or territorial court of the United States, held in the district in which the association is located."

Mr. Justice Clifford pointed out that since the Bank was organized under the laws of Congress it ordinarily could be sued only in the Federal courts. It was therefore the purpose of section 57 (supra) to remove this immunity from being sued in the state courts. They thereupon became subject to suit in the state courts to the same extent (but no further) that other similar associations organized under state laws were subject thereto. Thus the defendant Bank of Bethel was in the same posi-

tion as the Morosco Company in the case at bar. The only statutory provision covering the comptroller (who would be analogous to the receiver in the case at bar) was section 50 quoted above to the effect that he "shall make a ratable dividend * * * on all such claims as may have been proved to his satisfaction or adjudicated in a *court of competent jurisdiction.*" There is no statutory definition of the term "court of competent jurisdiction," and it was therefore necessary to rely on the common law governing receivers of associations which were subject to suit in the state courts (i.e., associations not organized under laws of Congress). Section 57 of the Act of 1864 (quoted above) related only *to associations.* It said nothing about their *receivers.* Accordingly the defendant Bank argued that claims "adjudicated in a court of competent jurisdiction" meant those adjudicated before the receiver was appointed. This court, however, held that the receiver must recognize the judgment of a state court, although rendered subsequent to the appointment of the receiver, as determining the amount of the claim, although not conferring a lien. Mr. Justice Clifford relied not only on the statute, but also on the "*analogies of the law.*" He said, at page 401:

> "Attempt is made to show that the adjudicated claims there referred to are only such as had been adjudicated before the receiver was appointed, but the court is of the opinion that such a construction is not warranted either by the language employed, or the subject-matter to which it relates, or the purpose to be accomplished, or by the analogies of the law or the usual rules of interpretation which courts apply in ascertaining the meaning of a legislative provision of a remedial character. Tested by any one or all of these criterions the court is of the opinion that the construction assumed by the defendants

is quite too narrow to carry into effect the intention which the framers of the provision had in view at the time it was adopted. Claims presented by creditors may be proved before the receiver, or they may be put in suit in any court of competent jurisdiction, as a means of establishing their validity and to determine the amount owed by the association, but the judgment when recovered will not give the creditor any lien on the property of the delinquent association, nor secure to the judgment creditor any preference over other creditors whose claims are proven before the receiver. All alike must await the action of the Comptroller of the Currency, and be content with a just and legal distribution of the proceeds of the assets collected by the receiver and liquidated by the comptroller according to the act of Congress in such case made and provided."

Thus again, this court, recognizing the distinction between actions in rem and those in personam where a conflict arose between courts of concurrent jurisdiction held that a judgment against a corporation after the appointment of a receiver, was a judgment in personam, and was binding upon the receiver as a valid determination of the amount due.

In view of the express adjudications in other courts relied on by Judge Swan in his opinion (19 Fed. [2d], 766, 768) and of the eminent authorities there cited, and in view of the analogous decision of this court where the same question was presented in dealing with decedent's estates, receiverships of national banks, and even ordinary Equity receiverships as in the case at bar where the judgment against the corporation was in personam (*Calhoun* vs. *Lanaux*, supra, 127 U. S., 634), it is submitted that the opinion of Judge Swan represents a

well-settled doctrine in the law of receiverships. The judgment below should therefore be affirmed.

Respectfully submitted,

NATHAN BURKAN,
Solicitor for Edward Margolies,
Respondent.

(10)

SUPREME COURT OF THE UNITED STATES.

No. 347.—October Term, 1928.

John Martin Riehle, Receiver, etc., Petitioner, vs. Edward Margolies.	On Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[April 8, 1929.]

Mr. Justice Brandeis delivered the opinion of the Court.

This proceeding, commenced in 1923 in the federal court for southern New York, is what is called a friendly receivership. The federal jurisdiction was invoked solely on the ground of diversity of citizenship. The plaintiff, Hatch, a citizen of New York, is the holder of a dishonored check of the sole defendant, the Morosco Holding Company, Inc., a Delaware corporation, apparently with its principal place of business in New York. The bill alleges that the Company has a variety of assets, largely intangible, and many liabilities; and that, although financially embarrassed, it is solvent. The prayers are that the court administer its entire property; appoint for this purpose a receiver; and enjoin all persons from interfering with his possession. An answer presented with the bill admitted its allegations and joined in its prayers. Riehle was appointed receiver. Thereafter orders were entered restraining the prosecution of suits against the Company and directing creditors to file with the receiver their claims against the Company. So far as appears no order of distribution has been made.

Among the Company's creditors, but not mentioned in the bill, was Margolies. Two months before the institution of this suit in the federal court, he had commenced in the Supreme Court of New York an action against the Company to recover $124,381 for breach of a contract. That action, in which the Company had filed an answer and counterclaim, was pending when the receiver was appointed. It was stayed by the order of the federal court. Margolies did not, so far as appears, challenge the jurisdiction of the

federal court. Compare *Harkin* v. *Brundage*, 276 U. S. 36, 51-52; *Lion Bonding & Surety Co.* v. *Karatz*, 262 U. S. 77, 85; *Pusey & Jones Co.* v. *Hanssen*, 261 U. S. 491, 500. He applied to it for a modification of the order so that he might prosecute his action in the state court; and he sought to have the receiver directed to contest or liquidate the claim there. The denial by the District Court of that motion, and the contention by the receiver that the judgment later recovered in the state court is not to be accepted in the receivership proceedings as conclusive proof of the existence and amount of Margolies' claim, have been the subject of four decisions by the Circuit Court of Appeals for the Second Circuit. The last of them only is here for review; but what happened earlier must be stated. The record of the proceedings is fragmentary, but supplemented by the opinions of the Court of Appeals shows the following.

On the first appeal, *Hatch* v. *Morosco Holding Co.*, 5 F. (2d) 1015, the unanimous court reversed with costs, as "a plain violation of section 265 of the Judicial Code," the refusal of the District Court to permit Margolies to prosecute his claim in the state court. In doing so, the appellate court said: "A direction will, however, be included in our mandate, and in the order to be entered thereupon, that should any judgment be entered in said action in the State court, such judgment shall not be taken to be a liquidation of any claim filed or capable of being filed under the judgment [*sic*] creditors' bill herein, or as in any way affecting the right of the receiver to contest the claim so reduced to judgment de novo. Nothing, however, in our mandate shall be taken to prevent the court below permitting liquidation of Margolies' claim by suit in the state court, should it prefer so to do."

Upon the coming down of the mandate, Margolies moved in the District Court that the receiver be directed to liquidate the claim in the action pending in the state court. The motion was denied. Thereupon, formal notice of trial of that action was served upon both the receiver and the attorney of record of the Company. Neither appeared at the trial. Judgment by default was taken against the Company; and upon an inquest as to the amount of the damages, judgment was entered in the sum of $55,283.88 which included interest and costs. Thereupon, Margolies moved in the Circuit Court of Appeals that its mandate on the first appeal be recalled and corrected, so that the receiver should not be permitted

to try *de novo* in the District Court the issue on his claim. This motion was denied by the Circuit Court of Appeals, apparently without an opinion.

Margolies then filed in the District Court his verified proof of claim; and at a hearing thereon had before a special master presented an exemplified copy of the judgment in the state court. The receiver thereupon announced his election "to have the claim tried de novo"; the master recommended that the claim be dismissed "upon the authority of the opinion of the Court of Appeals", and the District Court ordered that Margolies' claim be dismissed. This order was the subject of another appeal by Margolies. *Hatch* v. *Morosco Holding Co., Inc., Appeal of Margolies,* 19 F. (2d) 766. There the court held, by a majority decision, that the direction in the mandate to the effect that any judgment recovered in the state court should not affect the right of the receiver to contest the claim *de novo* in the federal court had been improvidently made. It, therefore, reversed the judgment of the District Court and remanded the cause for further proceedings.

At the hearing then had before the special master Margolies put in evidence the judgment and rested. The receiver offered to prove that the claim was less than the amount of the judgment. The master excluded the evidence and recommended that judgment be entered for the full amount save for a small deduction directed by the Circuit Court of Appeals on the interest allowed by the state court, which is not challenged here. His report was confirmed by the District Court. The receiver appealed to the Circuit Court of Appeals. It affirmed the judgment, *Hatch* v. *Morosco Holding Co., Inc., Ex parte Margolies,* 26 F. (2d) 247; but, in doing so, said: "A majority of the court, as it is now constituted, think that our first decision impairs the jurisdiction of the District Court over assets already in its custody when the judgment of the state court was entered. They believe that liquidation of claims is a part of the distribution of the estate, since it determines how much each creditor shall get, and that the distribution of the estate is part of what is usually understood as jurisdiction over the res. However, the former decision was reached after unusual deliberation and full presentation of all the questions involved. If it is to be changed, only the Supreme Court may do so; in the same case and on the same claim the first ruling must stand." This Court then granted a writ of certiorari. 278 U. S.

—. We are of opinion that the view there expressed by the majority is erroneous and that the judgment should be affirmed.

The appointment of a receiver of a debtor's property by a federal court confers upon it, regardless of citizenship and of the amount in controversy, federal jurisdiction to decide all questions incident to the preservation, collection and distribution of the assets. It may do this either in the original suit, *Rouse* v. *Letcher*, 156 U. S. 47, 49-50, or by ancillary proceedings, *White* v. *Ewing*, 159 U. S. 36. Compare *Kelley* v. *Gill*, 245 U. S. 116, 119. And it may, despite § 265 of the Judicial Code, issue under § 262 or otherwise, all writs necessary to protect from interference all property in its possession. *Julian* v. *Central Trust Co.*, 193 U. S. 93, 112. But the appointment of the receiver does not necessarily draw to the federal court the exclusive right to determine all questions or rights of action affecting the debtor's estate. *Calhoun* v. *Lanaux*, 127 U. S. 634, 637-639. This is true, *a fortiori*, as to the subject matter of a suit pending in a state court when the receivership suit was begun. Compare *Haines* v. *Carpenter*, 91 U. S. 254. The rule that, when the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it have once attached the right cannot be restrained by proceedings in any other court, applies to protect the jurisdiction of the state court unless the case is within some recognized exception to § 265 of the Judicial Code. Compare *Hull* v. *Burr*, 234 U. S. 712, 723; *Wells Fargo & Co.* v. *Taylor*, 254 U. S. 175, 182-184; *Essanay Film Co.* v. *Kane*, 258 U. S. 358, 361; *Atchison, Topeka & Santa Fe Ry. Co.* v. *Wells*, 265 U. S. 101, 103. Here there is no basis for any such exception.

The contention that the judgment is not conclusive rests upon the argument that, because the appointment of the receiver draws to the appointing court control of the assets and in the distribution of them among creditors there is necessarily involved a determination both of the existence of the claim and of the amount of the indebtedness, the federal court must have the exclusive power to make that determination. The argument ignores the fact that an order which results in the distribution of assets among creditors has ordinarily a twofold aspect. In so far as it directs distribution, and fixes the time and manner of distribution, it deals directly with the property. In so far as it determines, or recognizes a prior determination of the existence and amount of the indebtedness of the defendant to the several creditors seeking to participate,

it does not deal directly with any of the property. The latter function, which is spoken of as the liquidation of a claim, is strictly a proceeding *in personam*. Of course, no one can obtain any part of the assets, or enforce a right to specific property in the possession of a receiver, except upon application to the court which appointed him. *Lion Bonding & Surety Co.* v. *Karatz*, 262 U. S. 77, 88-9. But the judgment of the state court does not purport to deal with the property. The sole question involved there was the existence and amount of Margolies' claim against the corporation. And the sole question involved here is the proof of that claim. There is no inherent reason why the adjudication of the liability of the debtor *in personam* may not be had in some court other than that which has control of the *res*. It is only necessary that in the receivership proof of the claim be made in an orderly way, so that it may be established who the creditors are and the amounts due them.

The power to fix the time for distribution may include the power, in the exercise of judicial discretion, to decline to postpone distribution awaiting disposition of litigation in another court over a contested claim. Compare *Wm. Filine's Sons Co.* v. *Weed*, 245 U. S. 357, 602; *Pennsylvania Steel Co.* v. *New York City Ry.*, 229 Fed. 120. But there is no reason why the character of the proof required in the receivership suit for any purpose should be different from that which would have been required had the judgment in the state court been rendered prior to the appointment of the receiver; or from that which would be required if an independent suit on the judgment were brought in the federal court. It would hardly be doubted that a final judgment, recovered in a state court prior to the commencement of the receivership suit, would establish conclusively the existence and amount of the claim against the debtor, if later a decree were entered in the federal court distributing the funds in the receiver's hands among its creditors. Whether such a judgment recovered in a suit commenced after the appointment of the receiver would operate as *res judicata* we need not consider. For Margolies' suit was begun before. He had, under § 265 of the Judicial Code, the right to prosecute that suit to judgment despite the institution later of the receivership proceedings. He must have, as an incident thereof, the further right to have it accepted therein as an adjudication of the existence of the indebtedness. The fact that neither the Company nor the receiver undertook to defend in the state court is, in this connection, immaterial. A judgment of

a court having jurisdiction of the parties and of the subject matter operates as *res judicata*, in the absence of fraud or collusion, even if obtained upon a default. *Last Chance Mining Co.* v. *Tyler Mining Co.*, 157 U. S. 683, 691. Compare *Northern Pacific Ry. Co.* v. *Slaght*, 205 U. S. 122.

The establishment of a claim constituting the basis of the right to participate in the distribution of property in the possession of one court is often conclusively determined by a judgment obtained in another court. Thus, a judgment of a federal court may establish conclusively the fact which entitles one to share in a decedent's estate in course of administration in a state court. *Yonley* v. *Lavender*, 21 Wall. 276; *Hess* v. *Reynolds*, 113 U. S. 73; *Byers* v. *McAuley*, 149 U. S. 608, 620; *Waterman* v. *Canal-Louisiana Bank*, 215 U. S. 33. Under the Bankruptcy Act of 1867, a judgment against the debtor rendered in a suit in a state court pending at the time of the commencement of the bankruptcy proceedings established conclusively in bankruptcy the existence and amount of the debt provable against the estate. *Norton* v. *Switzer*, 93 U. S. 355, 363-364. Compare *Hill* v. *Harding*, 107 U. S. 631. A judgment in a state court against a receiver, pursuant to § 66 of the Judicial Code, establishes conclusively the right to payment from the funds of the receivership, although the Act makes the suit in the state court "subject to the general equity jurisdiction of the court in which such manager or receiver was appointed so far as the same shall be necessary to the ends of justice."[1] Where a receivership of a national bank is appointed by the Comptroller of the Currency, a judgment entered after the appointment in an action commenced in a state court before the appointment is binding upon the receivers as well as upon the bank. *Speckert* v. *German National Bank*, 98 Fed. 151, 154.

The rule that the appointment by a federal court of a receiver on a creditor's bill gives it no right to stay a suit then pending in a state court and that the judgment *in personam* thereafter recovered therein in the state court against the debtor must be held to

[1]Central Trust Co. v. St. Louis, Arkansas & Texas Ry. Co., 41 Fed. 551; Dillingham v. Hawk, 60 Fed. 494; St. Louis S. W. Ry. Co. v. Holbrook, 72 Fed. 112; Willcox v. Jones, 177 Fed. 870; Manhattan Trust Co. v. Chicago Electric Traction Co., 188 Fed. 1006; American Brakeshoe & Foundry Co. v. Pere Marquette R. R. Co., 263 Fed. 237, 278 Fed. 832; International & Great Northern Ry. Co. v. Adkins, 14 F. (2d) 149.

have established conclusively the existence and amount of the claim for the purpose of proof in the federal court, and will enable the claimant to participate in a distribution among creditors of the debtor's property ordered therein, has long been applied in some of the lower federal courts.[2] No case has been found in which the right has been denied. A like rule has been applied in state courts.[3] In *Pendleton* v. *Russell*, 144 U. S. 640, 644, it was sought to prove against funds of a dissolved corporation in the hands of a receiver appointed by a court of New York a judgment recovered in Tennessee after the dissolution. The proof was disallowed because the dissolution had operated, like death, as an abatement of the suit. But the court said: "Had the original judgment of the Circuit Court of the United States been affirmed, instead of being reversed, it having been rendered when the insurance company was in existence, it would have stood as a valid claim against the assets of that company after its dissolution."

There are some cases arising under the Bankruptcy Act and some under state insolvency laws in which a judgment recovered in the state court was held not to be conclusive in the bankruptcy or insolvency proceedings. Thus, it has been held by some lower federal courts that a judgment recovered after institution of bankruptcy proceedings in an action commenced in a state court prior thereto, on a claim to which the limited power to stay action in a state court conferred by § 11 of the Act of July 1, 1898, c. 541,

[2]Mercantile Trust Co. v. Pittsburg & Western R. R. Co., 29 Fed. 732; Pine Lake Iron Co. v. Lafayette Car Works, 53 Fed. 853. Compare Shelby v. Bacon, 10 How. 56, 69-70; Wilder v. City of New Orleans, 87 Fed. 843, 848; Anglo-American Land, etc. Co. v. Cheshire Provident Institution, 124 Fed. 464, 466; Pennsylvania Steel Co. v. New York City Ry. Co., 161 Fed. 786, 787; United States v. Illinois Surety Co., 238 Fed. 840, 846; International & Great Northern Ry. Co. v. Adkins, 14 F. (2d) 149, 152.

[3]Pringle v. Woolworth, 90 N. Y. 502; Taylor v. Gray, 59 N. J. Eq. 621; St. Louis, R. & M. Ry. Co. v. Green, (Texas Civil Appeals) 183 S. W. 829, 833. See "Judgment Claims in Receivership Proceedings" by Judge John K. Beach, 30 Yale Law Journal 674. Compare Central Trust Co. v. D'Arcy, 238 Mo. 676, where the rule was applied to proof under an assignment for the benefit of creditors; Matter of Empire State Surety Co., 216 N. Y. 273, 283. See contra Evans v. Illinois Surety Co., 319 Ill. 105, in which the difference between an equity receivership and receivers under bankruptcy or insolvency laws was not referred to. Cases like In re New Jersey Refrigerating Co., 97 N. J. Eq. 358, where both actions are brought in courts of the same State, depend, of course, upon the local law.

30 Stat. 549, applies, is not to be accepted in bankruptcy as conclusive proof of the claim.[4] Similarly it has been held, where a statutory proceeding for the winding up an insolvent corporation is brought in the State of the incorporation, that the assets will be distributed only among those persons who have been found to be creditors either by that court or elsewhere with its leave; and that a judgment recovered in another State without leave from it will not entitle the plaintiff to share in the assets.[5] These decisions are not inconsistent with the conclusion stated above. They have no application to receiverships in a federal court sitting in equity, which lacks the power to stay an action in the state court. Margolies had the absolute right to prosecute his claim to judgment in the state court; the order of the District Court staying its prosecution was properly dissolved; and the judgment entered there is conclusive as between the parties and their privies in the federal court. *Kline* v. *Burke Construction Co.*, 260 U. S. 226, 230, 233.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[4] In re Hoey, Tilden & Co., 292 Fed. 269, 271; In re James A. Brady Foundry Co., 3 F. (2d) 437; In re Barrett & Co., 27 F. (2d) 159. Whether that is the correct rule we have no occasion to consider. See contra In re Buchan's Soap Corp., 169 Fed. 1017. Compare Hobbs v. Head & Dowst Co., 184 Fed. 409; In re Benwood Brewing Co., 202 Fed. 326, 327-8; In re Havens, 272 Fed. 973; In re Rothenstein, 276 Fed. 704; In re Kelley, 297 Fed. 676; In re Winter, 17 F. (2d) 153.

[5] Attorney General v. Legion of Honor, 196 Mass. 151; Hackett v. Legion of Honor, 206 Mass. 139, 142.